

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 EDWARDS LIFESCIENCES AG and : Civil Action
5 EDWARDS LIFESCIENCES LLC, :

6 Plaintiffs, :

7 v. :

8 COREVALVE, INC., :

9 Defendant. : No. 08-91 (GMS)

10 - - -

11 Wilmington, Delaware
12 Thursday, April 1, 2010
13 9:30 a.m.
14 Day 8 of Trial

15 - - -

16 BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge,
17 and a Jury

18 APPEARANCES:

19 JACK B. BLUMENFELD, ESQ.
20 Morris, Nichols, Arsht & Tunnell LLP
21 -and-

22 JOHN E. NATHAN, ESQ.,
23 CATHERINE NYARADY, ESQ.,
24 BRIAN EGAN, ESQ., and
25 KRIPA RAMAN, ESQ.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
(New York, N.Y.)

Counsel for Plaintiffs

1 **APPEARANCES CONTINUED:**

2 **JOHN W. SHAW, ESQ.**
3 **Young Conaway Stargatt & Taylor LLP**

4 **-and-**

5 **ROBERT A. VAN NEST, ESQ.,**
6 **BRIAN FERRALL, ESQ., and**
7 **KAREN VOGEL WEIL, ESQ.**

8 **-and-**

9 **JOSEPH S. CIANFRANI, ESQ.**
10 **Knobbe Martens Olson & Bear LLP**
11 **(Irvine, CA)**

12 **Counsel for Defendant**

13 **- - -**

1 THE COURT: Good morning.

2 (Counsel respond "Good morning.")

3 THE COURT: Counsel, please be seated.

4 Counsel, here is what I have printed off the
5 docket. I have CoreValve's motion, JMOL on enablement and
6 damages, JMOLs on enablement and damages, and Edwards's JMOL
7 on literal infringement and doctrine of equivalents, as well
8 as on the issues of willfulness, enablement and damages.

9 I will reserve on these, counsel, perhaps rule
10 before the jury comes back, I don't know. But I am going to
11 reserve for now, because I have not had the time to address
12 these. And we have a jury that is waiting to be charged.

13 I am disappointed, but I am not shocked, that
14 there is not agreement on the verdict form.

15 The last iteration of any form that I see on the
16 docket is plaintiffs' proposed verdict form. I was looking
17 around for CoreValve's.

18 Do you have it, Ms. Walker?

19 Let's see what we have.

20 I think I now have CoreValve's. CoreValve had,
21 in its last iteration, proposed Question 7, the date of the
22 hypothetical negotiations.

23 MS. WEIL: Question 7 and Question 8.

24 THE COURT: So I don't have your most recent.

25 MS. WEIL: It was filed -- I have a red line.

1 THE COURT: Yes, Mr. Shaw?

2 MR. SHAW: Yes, Your Honor (handing to Court.)

3 THE COURT: So, Ms. Weil, this is not the
4 version we were discussing yesterday?

5 MS. WEIL: That's right. What happened last
6 night was Edwards sent over a revised verdict in which they
7 had two damages questions instead of one. Originally it was
8 one, total damages. Now there is lost profits, reasonable
9 royalty. Then we added 2.

10 THE COURT: And you and Mr. Blumenfeld didn't go
11 to dinner and work this out?

12 MS. WEIL: No, we didn't.

13 MR. BLUMENFELD: Neither, Your Honor.

14 THE COURT: Who wants to go first?

15 MS. WEIL: I will.

16 Question 7, this was intended to address Mr.
17 Blumenfeld's comments yesterday, where we had originally had
18 question on the royalty rate. So he made the argument that
19 that kind of played into our hands because we had a rate and
20 they didn't.

21 So to address that, I changed the question to
22 state the quantity of CoreValve sales in units or revenues
23 for which they were awarding reasonable royalty damages.
24 That way we can figure out what the rate is.

25 The reason why I put that question in there is

1 that if the jury does get to the issue of damages, if they
2 don't have that, it will be impossible to try to figure out
3 how to carry damages forward.

4 We need some way to give be able to do that.

5 I think that this should address Mr.
6 Blumenfeld's concerns yesterday. And that's why that is
7 there.

8 Question 8 is the question on the hypothetical
9 negotiation. Rather than having it be a multiple-choice
10 question, which they were concerned about, I just made it
11 open-ended and was trying to accommodate their concern on
12 that.

13 THE COURT: Okay. What I will do is now ask Mr.
14 Blumenfeld to explain the rationale for your verdict form.
15 And I will give you both a chance to tell me why you feel
16 that the other's doesn't work.

17 MR. BLUMENFELD: Your Honor, first of all, the
18 version we got late last night is different than what Ms.
19 Weil said. The version we got back says in answer to
20 question 6 please state the royalty rate you applied. That
21 is what I got last night.

22 THE COURT: Here is what I have in my hands: In
23 answering Question 6, please state the quantity of
24 CoreValve's sales in units or revenues in which you awarded
25 reasonable royalty damages.

1 MS. WEIL: I can share this.

2 MR. BLUMENFELD: At any rate, Your Honor, what
3 we tried to do last night was separate out the lost profits
4 and the reasonable royalty. And we think that's fair.

5 To put on the jury the burden of saying I now
6 have the version, tell us the quantity in units or revenues
7 on which you awarded them, is just putting a big burden on
8 the jury. And the hypothetical negotiation, also.

9 I guess what I would say is, I have been
10 litigating patent cases in this Court for a long time. I
11 have never seen questions like this. If you are going to
12 start getting into subsidiary questions on verdict sheets --
13 no one did this with enablement and no one it with any other
14 issue.

15 We are not asking, what's the level of skill
16 that you found or things like that. And it really is
17 putting a burden on the jury to have to go through and
18 quantify units or revenues, and then say, and what date did
19 you apply.

20 The way the Courts have done it, at least in my
21 experience, even the Integra Court where they reversed,
22 which they talked about, said we are sending it back to the
23 judge to do a proper calculation of damages, nobody said we
24 are sending it back and the verdict sheet has to have these
25 questions on it.

1 THE COURT: Yes. I read the relevant portions
2 of the case.

3 Mr. Blumenfeld, does CoreValve have a complaint,
4 nonetheless, that perhaps your verdict form doesn't account
5 for their theory?

6 As I understood Mr. Kinrich's testimony, he
7 disagrees with Dr. Leonard, I thought he disagreed that
8 Edwards was entitled to any lost profits, and he had
9 calculated a royalty, an amount of royalty. Do you account
10 for that?

11 MR. BLUMENFELD: That is correct. He did two
12 things. One, he said I think there should just be a
13 reasonable royalty. Here's what it is. But if you find
14 lost profits, it should be this amount. But I think we have
15 accounted for that, because in Question 5, we say, If you
16 believe that Edwards has proven by a preponderance of the
17 evidence it is entitled to lost profits for a portion of the
18 infringing sales, please enter the amount.

19 And then the next question is, for those
20 CoreValve infringing sales for which you did not award
21 Edwards lost profits, what is the amount of reasonable
22 royalty?

23 So if they don't find lost profits, the answer
24 to 5 will be zero, and then they will fill in a reasonable
25 royalty number in 6.

1 So I don't think there is any prejudice to
2 CoreValve from the way 5 and 6 are lined up. And I don't
3 think that they had any objection to 5 and 6.

4 THE COURT: Let's find out. That was just a
5 question that came up in my mind.

6 MS. WEIL: That is correct. We don't have an
7 objection to 5 and 6. We just don't think that is enough.
8 So we wanted to add 7 and 8.

9 THE COURT: I agree with Mr. Blumenfeld that 7
10 and 8 are unnecessary. I don't think that the case you
11 cited stands for the proposition for which you cited it. I
12 disagree with you in that regard, that the case stands for
13 the reasons you articulated yesterday, at least insofar as I
14 believe Mr. Blumenfeld has accurately interpreted the
15 circuit's decision as saying you have to have this issue in
16 the verdict form, and, quite frankly, I have never seen it,
17 either, and I don't intend to start with this case.

18 MR. BLUMENFELD: Your Honor, we do have several
19 sets of these. If I can hand them to Ms. Walker.

20 THE COURT: Please do, yes.

21 So the Court will adopt plaintiffs' proposed
22 form. And the Court will assume, as you indicated
23 yesterday, counsel, that both of you intend to talk about
24 the verdict form. So I will forego my discussion of it in
25 my instructions. Is that correct?

1 MR. VAN NEST: Yes, Your Honor.

2 THE COURT: Okay.

3 Any other issues before the jury comes out?

4 MR. NATHAN: Yes, Your Honor. Just one.

5 Judge, we exchanged slides last night on
6 closings. There is one issue.

7 This is CoreValve's Slide 13, where they are
8 putting in something regarding the original claim and the
9 amended claim. Your Honor will recall that we went down
10 this track yesterday, on sidebar.

11 They danced up to the Festo issue. The Festo
12 issue is a question for the Court, not for the jury. I have
13 been told by Mr. Van Nest that he intends to argue that this
14 is important. And I believe it's just going to cause jury
15 confusion.

16 And I object to it, Your Honor.

17 The whole prosecution history amendment --

18 THE COURT: Important in what regard?

19 MR. NATHAN: I have no idea. It is either
20 Festo --

21 MR. VAN NEST: It is not Festo, Your Honor. The
22 only thing I want to point out is this is an important
23 limitation. This projecting from the side was important,
24 and they pointed it out to the Patent Office, kind of along
25 the lines of my cross-examination of Dr. Buller, which was

1 never objected to.

2 THE COURT: That is fine.

3 Mr. Blumenfeld.

4 MR. BLUMENFELD: We worked out last night some
5 issues of what goes to the jury. Ms. Weil and I agreed
6 that, as we discussed in court yesterday, that seven
7 demonstratives from each of the damages experts could go to
8 the jury. I think we are together on that. I don't know
9 whether --

10 THE COURT: Can we locate them now, for Ms.
11 Walker's convenience?

12 MR. BLUMENFELD: I think they have already been
13 included in what is going to go.

14 THE COURT: Okay.

15 MR. BLUMENFELD: The only issue left is -- we
16 agreed to put in the final demonstratives. Each of us put
17 into the jury notebooks for the damages expert their
18 workpapers, the backup material. We thought if they are
19 going to get the demonstratives it would be helpful for them
20 to also have the backup material if they wanted to look at
21 it.

22 I think Ms. Weil's position was it would be
23 confusing. I would think if they are going to get the final
24 sheet with the numbers, having the backup material in case
25 they want to look at it would be helpful to them rather than

1 confusing.

2 THE COURT: If they want the backup material,
3 they can ask for it. So we can take it out. I think it
4 might be confusing.

5 MR. BLUMENFELD: Thank you.

6 THE COURT: Are we ready?

7 Ms. Walker.

8 Mr. Cianfrani?

9 Jury is coming in.

10 (Jury enters courtroom at 9:45 a.m.)

11 THE COURT: Good morning, ladies and gentlemen.
12 Please take your seats. I apologize, we are 15
13 minutes off our time. We will hopefully make that up.

14 I misspoke yesterday a little bit. In terms of
15 the lawyers' closings, we are not going to just have two
16 rounds. There will be three. It still amounts to an hour
17 apiece. Mr. Nathan will have the opening 45 minutes. Mr.
18 Van Nest will have an hour's response. And then Mr. Nathan,
19 because they are the plaintiff, gets to offer 15 minutes in
20 rebuttal closing, if he chooses.

21 All right. Each of you now has in your hands a
22 copy of the final instructions and a verdict form.

23 I will tell you right now, I am not going to
24 discuss the verdict form. The instructions will say
25 something to the contrary, probably. But the lawyers will

1 talk about the verdict form with you. Frankly, it's rather
2 self-explanatory. It doesn't require, I think, a lot of
3 explanation. But there may be certain things that they
4 would like to highlight for you in their discussion with
5 you.

6 Members of the jury, now it is time for me to
7 instruct you about the law that you must follow in deciding
8 this case.

9 This will take some time, so bear with me.

10 Each of you, as I have said, has a copy of the
11 instructions. Again, you can read along or pay attention to
12 the Bench, however you choose.

13 I am going to start by explaining your duties
14 and general rules that apply in every civil case. Then I
15 will explain some rules that you must use in evaluating
16 particular testimony and evidence.

17 Then I will explain the positions of the parties
18 and the law that you will apply in this case.

19 And last, I will explain the rules that you must
20 follow during your deliberations in the jury room.

21 Again, the last part, the verdict form, is going
22 to be discussed with you by the lawyers.

23 Listen carefully to everything I have to say.

24 Members of the jury, it is important that you
25 bear in mind the distinction between your duties and mine.

1 You have two main duties as jurors. The first one is to
2 decide what the facts are from the evidence that you saw and
3 heard here in court. You, as you know, are the sole judges
4 of the facts. It is your judgment and your judgment alone
5 to determine what the facts are. And nothing at all that I
6 have said or done during this trial was meant to influence
7 your decision about the facts in any way.

8 Your second duty is to take the law that I give
9 to you, apply it to the facts, and decide if CoreValve is
10 liable, and if so, what monetary damages should be awarded
11 to Edwards.

12 Now, as far as my duty is concerned, I have the
13 duty of advising you about the law. You should apply that
14 law to the facts as you find them. You are not to consider
15 whether the principles I state are sound or whether they
16 accord with your own views about policy.

17 You are bound by the oath that you took at the
18 beginning of the trial to follow the instructions that I
19 give you, even if you personally disagree with them. You
20 must accept them despite how you feel about their wisdom.
21 This includes the instructions that I gave you before and
22 during the trial, and these instructions. All the
23 instructions are important, and you should consider them
24 together as a whole.

25 Perform these duties fairly. Do not let any

1 bias, sympathy or prejudice that you may feel toward one
2 side or the other influence your decision in any way.

3 Now, as you know, you must make your decision
4 based only on the evidence that you saw and heard here in
5 court. Do not let rumors, suspicions, or anything else that
6 you may have seen or heard outside of court influence your
7 decision in any way.

8 The evidence in this case includes only what the
9 witnesses said while they were testifying under oath,
10 deposition transcript testimony that was presented to you,
11 the exhibits that I allowed into evidence, and the
12 stipulations to which the lawyers agreed.

13 I think we should include video deposition in
14 that as well.

15 Nothing else is evidence. The lawyers'
16 statements and argument are not evidence. The arguments of
17 the lawyers are offered solely as an aid to help you in your
18 determination of the facts. Their questions, as you know,
19 and objections are not evidence. My rulings on those
20 objections are not evidence. And my comments and questions
21 I might have asked or made during the course of the trial
22 are not evidence.

23 During the trial I may not have let you, as you
24 know, hear the answers to certain questions the lawyers may
25 have asked. I also may have ruled that you could not see

1 some of the exhibits that the lawyers wanted you to see.
2 You must completely ignore all of these things. Do not
3 speculate about what a witness might have said, or what an
4 exhibit might have shown. And sometimes I may have ordered
5 you to disregard things that you saw or heard or I struck
6 things from the record. I think I did the former a time or
7 two. These things are not evidence, and you are bound by
8 your oath not to let them influence your decision in any
9 way.

10 Make your decision based only on the evidence,
11 as I have defined it, and nothing else.

12 Let's revisit direct and circumstantial
13 evidence. You have heard these terms before.

14 Direct evidence is simply evidence like the
15 testimony of an eyewitness which, if you believe it,
16 directly proves a fact. If a witness testified that she saw
17 it raining outside, and you believed her, that would be
18 direct evidence that it was raining.

19 Circumstantial evidence is simply a chain of
20 circumstances that indirectly proves a fact. If someone
21 walked into the courtroom today wearing a raincoat covered
22 with drops of water and carrying a wet umbrella, that would
23 be circumstantial evidence from which you could conclude
24 that it was raining outside.

25 It is your job to decide how much weight to give

1 the direct and circumstantial evidence. The law makes no
2 distinction between the weight that you should give to one
3 or the other, nor does it say that any one is better than
4 the other. You should consider all the evidence, both
5 direct and circumstantial, and give it whatever weight you
6 think it deserves.

7 You should use your common sense in weighing the
8 evidence. Consider it in light of your everyday experience
9 with people and events, and give it whatever weight you
10 believe it deserves. If your experience tells you that
11 certain evidence reasonably leads to a conclusion, you are
12 free to reach that conclusion.

13 A further word about statements and arguments
14 of counsel. The attorneys' statements and arguments, as you
15 know by now, are not evidence. Instead their statements and
16 arguments are intended to help you review the evidence
17 presented. If you remember the evidence differently from
18 the lawyers or the attorneys, you should rely on your own
19 recollection.

20 The role of attorneys is to zealously and
21 effectively advance the claims of the parties they represent
22 within the bounds of the law. An attorney may argue all
23 reasonable conclusions from the evidence in the record. It
24 is not proper, however, for an attorney to state an opinion
25 as to the truth or falsity of any testimony or evidence.

1 What an attorney personally thinks or believes about the
2 testimony or evidence in a case is simply not relevant, and
3 you are instructed to disregard any personal opinion or
4 evidence that an attorney has offered during the openings or
5 the coming closing statements, or at any other time during
6 the course of these proceedings.

7 Now, you are the sole judges of each witness's
8 credibility. You should consider each witness's means of
9 knowledge; strength of memory; opportunity to observe; how
10 reasonable or unreasonable the testimony is; whether it is
11 consistent or inconsistent; whether it has been contradicted;
12 the witness's biases, prejudice or interests; the witness's
13 manner or demeanor on the witness stand; and all
14 circumstances that, according to the evidence, could affect
15 the credibility of the testimony.

16 If you find the testimony to be contradictory,
17 you must try to reconcile it, if reasonably possible, so as
18 to make a harmonious story of it all. But if you can't do
19 this, then it is your duty and privilege to believe the
20 testimony that, in your judgment, is most believable and
21 disregard any testimony that, in your judgment, is not
22 believable.

23 Now, in determining the weight to give the
24 testimony of a witness, you should ask yourself whether
25 there is evidence tending to prove that the witness

1 testified falsely about some important fact, or, whether
2 there was evidence that at some other time the witness said
3 or did something, or failed to say or do something that was
4 different from the testimony he or she gave at trial or
5 during a deposition. You have the right to distrust such
6 witness's testimony in other particulars and you may reject
7 all or some of the testimony of that witness or give it such
8 credibility as you think it deserves.

9 You should remember that a simple mistake by a
10 witness does not necessarily mean that the witness was not
11 telling the truth. People may tend to forget some things or
12 remember other things inaccurately. If a witness has made a
13 misstatement, you must consider whether it was simply an
14 innocent lapse of memory or an intentional falsehood, and
15 that may depend upon whether it concerns an important fact
16 or an unimportant detail.

17 Now, expert testimony -- you've heard a lot of
18 that -- is testimony from a person who has special skill or
19 knowledge in some science, profession or business. This
20 knowledge is not common to the average person but has been
21 acquired by the expert through special training and/or
22 experience.

23 In weighing expert testimony, you may consider
24 the expert's qualifications, the bases for the expert's
25 opinion, and the reliability of the information supporting

1 the expert's opinions or opinion, as well the factors I have
2 previously mentioned for weighing the testimony of any other
3 witness. You are not required to accept an expert's
4 opinions. Expert testimony should receive whatever weight
5 and credit you think appropriate, given all the other
6 evidence in the case.

7 Now, two more points about the witnesses.

8 Sometimes jurors wonder if the number of
9 witnesses who testified makes my difference. Do not make
10 any decisions based only on the number of witnesses who
11 testified. What is more important is how believable the
12 witnesses were, and how much weight you think their
13 testimony deserves. Concentrate on that, ladies and
14 gentlemen, not the numbers.

15 Second, do not make any decision based on
16 whether the witness appeared to testify live or if the
17 witness testified by pre-recorded video examination. Both
18 forms of testimony are entitled to equal weight. No
19 inferences should be drawn from whether a witness testified
20 live or by video.

21 As you know, this is a civil case in which the
22 plaintiffs, Edwards are charging the defendant -- and I'm
23 going to shorten this down to "Edwards" and "CoreValve,"
24 okay? -- with patent infringement. Now, CoreValve denies
25 this charge. Edwards has the burden of proving its patent

1 infringement claim by a preponderance of the evidence. That
2 means Edwards has to produce evidence, which, when
3 considered in light of all the facts, leads you to believe
4 that what Edwards claims is more likely true than not. To
5 put it differently, if you were to put Edwards' and
6 CoreValve's evidence on opposite sides of the scale, the
7 evidence supporting Edwards' claims would have to make the
8 scales tip somewhat on Edwards' side.

9 Edwards also asserts that CoreValve's
10 infringement has been willful. Edwards has the burden of
11 proving this by clear and convincing evidence. Now, clear
12 and convincing evidence is evidence that produces in you an
13 abiding conviction that the truth of a factual contention is
14 highly probable. Proof by clear and convincing evidence is
15 thus a higher burden of proof than proof by a preponderance
16 of the evidence.

17 Now, CoreValve also asserts that Edwards patent
18 is invalid. A patent is presumed to be valid. Accordingly,
19 CoreValve has the burden of proving by clear and convincing
20 evidence that the patent is invalid.

21 Those of you who are familiar with criminal
22 cases will recall the term "proof beyond a reasonable
23 doubt." Now, that standard, that burden does not apply in a
24 civil case. Therefore, you should put that out of your mind
25 in considering whether or not the parties have met their

1 burdens in this case.

2 I already told you -- well, let's go through
3 this.

4 As you know, the plaintiffs in this case I
5 continue to refer to as "Edwards," which is a short form of
6 Edwards Lifesciences AG and Edwards Lifesciences LLC. And
7 you know that Edwards owns the '552 patent.

8 On the other hand, we have Medtronic CoreValve
9 LLC and CoreValve Inc. And as I have done throughout the
10 trial and will continue to do for the balance of these
11 instructions, I will refer to the parties as "Edwards" and
12 "CoreValve." Okay?

13 Now, Edwards seeks a determination that
14 CoreValve has infringed the '552 patent as a result of
15 unauthorized manufacture of CoreValve's products known as
16 the GEN 3 (or third generation) ReValving system.

17 Edwards contends that CoreValve manufactures the
18 accused ReValving system in California, and thereby
19 infringes the Edwards patent.

20 Edwards also contends that this infringement is
21 was willful and that it is entitled to damages.

22 There is no allegation in this case that
23 CoreValve's employees took any trade secrets from Edwards or
24 that CoreValve act improperly in hiring former Edwards
25 employees.

1 I will explain further each of these
2 contentions.

3 CoreValve contends that the accused ReValving
4 system does not infringe Claim 1 of the '552 patent because
5 Edwards has not proven that the accused ReValving system
6 meets every element of the asserted claim.

7 CoreValve further contends that the Edwards
8 patent is invalid because it was not enabled.

9 CoreValve also denies Edwards' allegation of
10 willful infringement and denies that Edwards is entitled to
11 any damages.

12 I will explain these contentions further.

13 Let me summarize the patent issues for you.

14 First. Whether Edwards has proven by a
15 preponderance of the evidence that the CoreValve GEN 3
16 ReValving system infringes, literally or under the doctrine
17 of equivalents, Claim 1 of the '552 patent.

18 Next. Whether Edwards proved by clear and
19 convincing evidence that CoreValve's infringement was
20 willful.

21 Whether CoreValve has proven by clear and
22 convincing evidence that Claim 1 of the '552 patent is
23 invalid for lack of enablement because the specification of
24 the patent (the text and drawings that appear in the patent
25 before the patent claims) did not contain a disclosure that

1 would enable one of ordinary skill in the art to make and
2 use the inventions of Claim 1 without undue experimentation.

3 Finally, yes. If, in answering the above
4 questions, you find CoreValve liable for patent
5 infringement, you must then decide the amount of damages
6 adequate to compensate Edwards for CoreValve's infringement.
7 Edwards has the burden to establish the amount of its
8 damages by a preponderance of the evidence.

9 Now, before you can decide whether CoreValve
10 has infringed Claim 1 of the '552 patent, you will have to
11 understand patent "claims." Now, patent claims, as you have
12 heard a number of times during this trial, define in words
13 the boundaries of what is Edwards' protected invention. The
14 patent claims are the numbered paragraphs at the end of the
15 patent. The patent claim at issue here (the asserted claim,
16 we call it) is Claim 1 of the '552 patent, beginning at
17 Column 7, Line 57 of the '552 patent. Only the claims of
18 the patent can be infringed. Neither the specification,
19 which, as you know, is the description of the invention, nor
20 the drawings of the patent can be infringed.

21 Now, you have a copy of the '552 patent in your
22 jury binder. I told you that it's Claim 1 that is at issue
23 here of the '552 patent.

24 The meaning of a patent claim -- what we call
25 claim construction -- is a question of law over which I have

1 exclusive or sole jurisdiction. I have already made, as you
2 know, the legal determination as to what the patent claims
3 mean. You must apply the definitions for certain claims in
4 Claim 1 of the '552 patent as I have construed them, or
5 defined them. In determining whether CoreValve infringes
6 Claim 1 of the '552 patent, you may not assign your own
7 meaning or understanding of these terms -- you must follow
8 my definitions. For any words in the claim for which I have
9 not provided you with a definition, you should apply their
10 ordinary meaning to one of skill in the art.

11 I will now provide you with a list of the claim
12 terms from Claim 1 of the '552 patent and meaning of the
13 claim terms the Court has construed. For your convenience
14 and reference, a copy of these claim territories are set
15 forth I think in Appendix A -- yes, it is there -- of the
16 instructions.

17 Okay. So Claim 1, here we go, of the '552
18 patent.

19 "elastical" means "capable of returning to an
20 original shape when forces are removed;"

21 next, "stent" means "a medical device that is
22 inserted into an anatomical vessel or passageway to provide
23 support;"

24 "commissural points" means "points or locations
25 where the leaflets of the valve are joined;"

1 "cylindrical support means" means "a portion of
2 the stent supporting the valve that has a shape of or
3 relating to a cylinder." Now, the term "cylindrical" does
4 not mean that the object described must be a cylinder with a
5 diameter that is constant along its length or longitudinal
6 axis. To put it another way, the term "cylindrical" as used
7 in the patent in this case does not require the presence of
8 a perfect geometric cylinder;

9 "radially collapsible" means "capable of
10 reducing or of being reduced in diameter along a cross
11 section of the cylindrical support means;"

12 "circumferentially expendable section" -- should
13 be that expandable section, or is it expendable?

14 MR. VAN NEST: Expandable.

15 THE COURT: Expandable. Okay. There is a typo
16 there.

17 "Circumferentially-expandable section" means --
18 do you see that in No. 6? Okay -- means "a section of the
19 cylindrical support means that is capable of increasing or
20 of being increased in diameter;"

21 next, "radially expandable" means "capable of
22 increasing or of being increased in diameter along a cross
23 section of the cylindrical support means;

24 "commissural supports" means "portions of the
25 stent that support the commissural points of the valve;"

1 next, "projecting from one side of the
2 cylindrical support" means in a direction generally parallel
3 to the longitudinal axis thereof" means "projecting from one
4 side of the cylindrical support means in a direction
5 generally parallel to the longitudinal axis of the
6 cylindrical support means;"

7 and, finally, "by means of a technique of
8 catheterization" means "use of a catheter to deliver the
9 valve prosthesis."

10 Now, a patent, as you know, confers on its owner
11 the right to exclude others from doing a number of things,
12 such as making, using, selling, or offering to sell,
13 importing or supplying the patented invention in the U.S.,
14 in the United States, during the term of its patent. Any
15 company which makes, uses, sells, offers to sell, imports or
16 supplies without the patent owner's permission, any product
17 in the U.S. legally protected by at least one claim of a
18 patent before the patent expires, infringes the patent. It
19 is as simple as that.

20 The patent owner may enforce his rights or her
21 rights by filing a lawsuit for patent infringement. Here,
22 Edwards, the patent owner, has sued for its rights for that
23 matter, I would imagine. Here, Edwards, the patent owner,
24 has sued CoreValve, the accused infringer, and has alleged
25 that CoreValve's GEN 3 ReValving system infringes Claim 1 of

1 the Edwards '552 patent.

2 You must decide whether Edwards has proven by a
3 preponderance of the evidence that CoreValve's GEN 3
4 ReValving system infringes Claim 1 of the '552 patent either
5 literally or under the doctrine of equivalents.

6 Now, in this case, Edwards contends that
7 CoreValve manufactures the accused GEN 3 ReValving system in
8 California, and thus infringes the '552 patent.

9 Let me say something about the term comprising.
10 You have heard that term here.

11 The preamble of Claim 1 of the '552 patent uses
12 the phrase "the stent comprises." This claim is what we
13 call open-ended. The word "comprising" means "including" or
14 "containing." As such, the claim is not limited to only
15 what is in the claim.

16 If you find that the CoreValve GEN 3 ReValving
17 system includes all of the elements of Claim 1 of the '552
18 patent, the fact that the CoreValve GEN 3 ReValving system
19 also may include features or components not required by the
20 claims is irrelevant. The presence of additional features
21 or components in the ReValving system would not avoid
22 infringement of Claim 1.

23 The first type of infringement, literal
24 infringement.

25 As you know, there are two ways in this case

1 that you are going to consider, two ways in which a patent
2 claim may be infringed. First, a claim may be literally
3 infringed. Second, a claim may be infringed under what is
4 known as the doctrine of equivalents. I will address this
5 shortly.

6 For the GEN 3 system to literally infringe Claim
7 1, the elements of the patent claim must be found in the
8 CoreValve product. In other words, the asserted claim is
9 literally infringed if CoreValve's GEN 3 product includes
10 each and every element in the asserted claim. The scope of
11 Claim 1 is not limited to the preferred embodiments set
12 forth in the patent. If CoreValve's GEN 3 product does not
13 contain one or more elements recited in Claim 1, then
14 CoreValve does not literally infringe that claim.

15 Remember, the question is whether CoreValve's
16 product infringes the claim of the Edwards patent, and not
17 whether CoreValve's product is similar or even identical to
18 a product made by Edwards. It's accused product to claim,
19 claim to accused product.

20 In addition, later filed patents are not
21 relevant to literal infringement. But, as I will now
22 explain, it will be relevant to infringement under the
23 doctrine of equivalents.

24 Let's talk about that.

25 If you do not find literal infringement, you may

1 consider infringement under the doctrine of equivalents. I
2 have referred to the doctrine of equivalents. Now it is
3 time to explain this term.

4 You may find that the GEN 3 product infringes
5 the asserted claim even if not all the elements of the claim
6 are present in CoreValve's product. You may find
7 infringement in such circumstances if the elements of
8 CoreValve's GEN 3 product are equivalent to the claim
9 elements. This is called the doctrine of equivalents.

10 Application of the doctrine of equivalents is
11 the exception, however, not the rule. Patent claims must be
12 clear enough so that the public has fair notice of what was
13 patented. Notice permits other parties to avoid actions
14 which infringe the patent and to design around the patent.
15 On the other hand, the patent owner should not be deprived
16 of the benefits of his patent or her patent by competitors
17 who appropriate the essence of an invention while barely
18 avoiding the literal language of the patent claims.

19 The test under the doctrine of equivalents is
20 whether certain of the CoreValve GEN 3 product components
21 involve no substantial differences from the elements of the
22 asserted claim. Another way to prove infringement under the
23 doctrine of equivalents is to determine whether each
24 component of CoreValve's GEN 3 product performs
25 substantially the same function, in substantially the same

1 way, to produce substantially the same result as the
2 corresponding element in the asserted claim.

3 It is not a requirement under the doctrine of
4 equivalents that those of ordinary skill in the art knew of
5 the equivalent when the patent application was filed or when
6 the patent issued, the patent was granted.

7 For the doctrine of equivalents only, a later
8 filed patent covering CoreValve's GEN 3 product may be
9 relevant to whether CoreValve's product substantially
10 differs from the elements of Claim 1 of the '552 patent. To
11 be relevant, you must find that the later filed patent
12 covers the CoreValve GEN 3 product. The later issuance of a
13 patent for a device raises no presumption of noninfringement
14 of the earlier patent. It is for you to decide whether
15 CoreValve's product is an equivalent to the elements of
16 Edwards's asserted claim.

17 On the subject of willful infringement.

18 If you find on the basis of the evidence and the
19 law as I have explained it to you that CoreValve's product
20 infringes Claim 1, you must further decide whether or not
21 Edwards has proven by clear and convincing evidence that
22 CoreValve's infringement was willful.

23 Willful infringement is established if Edwards
24 has proven that CoreValve proceeded with infringing
25 activities despite an objectively high likelihood that

1 CoreValve's actions constituted infringement of a valid
2 patent. CoreValve's state of mind is not relevant to this
3 inquiry.

4 Edwards must also prove that this objectively
5 high risk or likelihood of infringement was either known, or
6 so obvious that it should have been known, to CoreValve.

7 CoreValve contends that Claim 1 of the Edwards
8 patent is invalid. Because the claims, as you know, of an
9 issued patent are presumed to be valid, CoreValve has the
10 burden of proving by clear and convincing evidence that
11 Claim 1 is invalid. You must determine whether Claim 1 is
12 invalid.

13 I will now instruct you in more detail on the
14 law concerning CoreValve's contentions of patent invalidity.

15 Enablement.

16 The patent laws require that the patent be
17 sufficiently detailed to enable those skilled in the art to
18 practice the invention. The purpose of this requirement is
19 to ensure that the public, in exchange for the patent rights
20 given to the inventor, obtains from the inventor a full
21 disclosure of how to make and use the invention.

22 If the inventors failed to provide an enabling
23 disclosure, the patent is invalid. However, because
24 descriptions in patents are addressed to those skilled in
25 the art to which the invention pertains, an applicant for a

1 patent need not expressly set forth in his specification
2 subject matter which is commonly understood by persons
3 skilled in the art.

4 The enablement defense does not require an
5 intent to withhold. All that is required is a failure to
6 teach how to practice the full scope of the claimed
7 invention. In other words, if a person of ordinary skill in
8 the art could not make and use the invention disclosed in
9 the patent without undue experimentation, the patent is
10 invalid. However, some routine amount of experimentation to
11 make and use the invention is allowable.

12 The patent need not contain a working example if
13 the invention is otherwise disclosed in such a manner that
14 one skilled in the art to which the invention pertains will
15 be able to practice it without an undue amount of
16 experimentation.

17 Now, the determination of whether a claimed
18 invention is obvious is, as you know, based on the
19 perspective of a person of ordinary skill in the pertinent
20 art field. For this case, the relevant time is as of May
21 18, 1990. That is the relevant time frame that we are
22 looking at for determining the person of skill. The person
23 of ordinary skill is presumed to know all prior art that you
24 have determined to be reasonably relevant. The person of
25 ordinary skill is also a person of ordinary creativity that

1 can use common sense to solve problems.

2 When determining the level of ordinary skill in
3 the art, you should consider all the evidence submitted by
4 the parties, including evidence of:

5 The level of education and experience of persons
6 actively working in the field at the time of the invention,
7 including the inventor;

8 Next. The types of problems encountered in the
9 art at the time of the invention;

10 And finally. The sophistication of the
11 technology in the art at the time of the invention,
12 including the prior art patents and publications.

13 If, after considering all of the evidence and
14 the law as I have stated it, you are convinced that the
15 Edwards patent is not infringed or invalid, your verdict
16 should be for CoreValve, and you need not go further in your
17 deliberations. On the other hand, if you decide that the
18 Edwards patent is not invalid and that Claim 1 of the patent
19 has been infringed by CoreValve, you must then turn to the
20 subject or the issue of damages. Edwards has the burden to
21 establish the amount of its damages by proof by a
22 preponderance of the evidence.

23 The patent laws provide that in the case of
24 infringement of a valid patent claim, the owner of the
25 patent, Edwards, shall be awarded damages adequate to

1 compensate for the infringement, but in no event less than a
2 reasonable royalty for the use made of the invention by the
3 infringer. Damages are compensation for all losses suffered
4 as a result of the infringement.

5 It is not relevant to the question of damages
6 whether CoreValve has benefited from, realized profits from,
7 or even lost money as a result of the acts of infringement.
8 The only issue is the amount necessary to adequately
9 compensate Edwards for CoreValve's infringement. They are
10 not meant to punish an infringer. Similarly, whether the
11 infringer knew that it would cause the patent owner harm is
12 also irrelevant to the computation of damages.

13 Adequate compensation should return Edwards to
14 the position it would have occupied had there been no
15 infringement. You must consider the amount of injury
16 suffered by Edwards without regard to CoreValve's gains or
17 losses from the infringement.

18 Once the fact of damages has been proven by a
19 finding of infringement, you must determine the extent of
20 damages. Under the patent law, Edwards is entitled to all
21 damages that can be proven with reasonable certainty. On
22 the one hand, reasonable certainty does not require proof of
23 damages with mathematical precision. Mere difficulty in
24 ascertaining damages is not fatal to Edwards. On the other
25 hand, Edwards is not entitled to speculative damages, that

1 is, you should not award any amount for loss which, although
2 possible, is wholly remote or left to conjecture and/or
3 guess. You may base your evaluation of reasonable certainty
4 on opinion evidence.

5 The but-for test in lost profits.

6 As you know, in this case Edwards seeks to
7 recover lost profits for some of CoreValve's sales of its
8 ReValving system, and a reasonable royalty on the rest of
9 CoreValve's sales.

10 To recover lost profits, as opposed to
11 reasonable royalties, Edwards must show a causal
12 relationship between the infringement and Edwards's loss of
13 profit. In other words, Edwards must show that but for the
14 infringement there is a reasonable probability that it would
15 have earned higher profits. To show this, Edwards must
16 prove that if there had been no infringement, it would have
17 made some portion of the sales that CoreValve made of the
18 infringing product. Edwards is entitled to lost profits if
19 it establishes each of the following:

20 First. That there was a demand for the patented
21 product.

22 That there were no available, acceptable,
23 noninfringing substitute products, or, if there were, its
24 market share of the number of the sales made by CoreValve
25 that Edwards would have made, despite the availability of

1 other acceptable noninfringing substitutes.

2 Third. That Edwards had or could and would have
3 expanded to have the manufacturing and marketing capacity to
4 make any infringing sales actually made by CoreValve and for
5 which Edwards seeks an award of lost profits - in other
6 words, that Edwards was capable of satisfying the demand.

7 And finally. The amount of profit that Edwards
8 would have made if CoreValve had not infringed.

9 Demand for the patented product can be proven by
10 significant sales of a patent holder's patented product or
11 significant sales of an infringing product containing the
12 patented features.

13 A patent holder is only entitled to lost profits
14 for sales it could have actually made. In other words,
15 Edwards must show that it had or could and would have
16 expanded to have the manufacturing and marketing capability
17 to make the sales it said it lost. This means Edwards must
18 prove it is more probable than not that it could have made
19 and sold, or could have had someone else make or sell for
20 it, the additional products it says it could have sold but
21 for the infringement.

22 A patent holder may calculate its lost profits
23 on lost sales by computing the lost revenue for sales it
24 claims it would have made but for the infringement and
25 subtracting from that figure the amount of additional costs

1 or expenses it would have incurred in making those lost
2 sales, such as cost of goods, sales costs, packaging costs,
3 and shipping costs. Certain fixed costs that do not vary
4 with increases in production or scale, such as taxes,
5 insurance, rent, and administrative overhead, should not be
6 subtracted from a patent holder's lost revenue.

7 Reasonable royalty.

8 If you find that Edwards has established
9 infringement, Edwards is entitled to at least a reasonable
10 royalty to compensate for that infringement. If you find
11 that Edwards has not proven its claim for lost profits or
12 has proved its claim for lost profits for only a portion of
13 the infringing sales, then you must award Edwards a
14 reasonable royalty for all infringing sales for which it has
15 not been awarded lost profits damages.

16 A royalty is a payment made to a patent holder
17 in exchange for the right to make, use, or sell the claimed
18 invention. A reasonable royalty is the amount of royalty
19 payment that a patent holder and the infringer would have
20 agreed to in a hypothetical negotiation taking place at the
21 time of or prior to when the infringement first began. In
22 considering this hypothetical negotiation, you should focus
23 on what the expectations of the patent holder and the
24 infringer would have been had they entered into an agreement
25 at that time and had they acted reasonably in their

1 negotiations. In determining this, you must assume that
2 both parties believed that the patent was valid and
3 infringed and the patent holder and infringer were willing
4 to enter into an agreement. The reasonable royalty you
5 determine must be a royalty that would have resulted from
6 the hypothetical negotiation and not simply a royalty either
7 party would have preferred. Evidence of things that
8 happened after the infringement first began can be
9 considered in evaluating the reasonable royalty only to the
10 extent that the evidence aids in assessing what royalty
11 would have resulted from a hypothetical negotiation.
12 Although evidence of the actual profits an alleged infringer
13 made may be used to determine the anticipated profits at the
14 time of the hypothetical negotiation, the royalty may not be
15 limited or increased based on the actual profits the alleged
16 infringer made.

17 The relevant factors in this calculation.

18 In determining the reasonable royalty, you
19 should consider all of the facts known and available to the
20 parties at the time the infringement began. Some of the
21 kinds of factors that you may consider in making your
22 determination are as follows.

23 As you know, you have heard about the
24 Georgia-Pacific factors, there are 15. Let me go through
25 them with you.

1 The royalties received by the patentee for the
2 licensing of the patent in suit, proving or tending to prove
3 an established royalty.

4 The rates paid by the licensee for the use of
5 other patents comparable to the patent in suit.

6 The nature and scope of the license, as
7 exclusive or nonexclusive, or as restricted or nonrestricted
8 in terms of territory or with respect to whom the
9 manufactured product may be sold.

10 The licensor's established policy and marketing
11 program to maintain his or her or its patent monopoly by not
12 licensing others, to use the invention or by granting
13 licenses under special conditions designed to preserve that
14 monopoly.

15 The commercial relationship between the licensor
16 and licensee, such as whether they are competitors in the
17 same territory, in the same line of business, or whether
18 they are inventor and promoter.

19 The effect of selling the patented specialty in
20 promoting sales of other products of the licensee, the
21 existing value of the invention to the licensor as a
22 generator of sales of its nonpatented items, and the extent
23 of such derivative or convoyed sales.

24 The duration of the patent and the term of the
25 license.

1 The established profitability of the product
2 made under the patent, its commercial success, and its
3 current popularity.

4 Ninth. The utility and advantages of the
5 patented property over the old modes or devices, if any,
6 that had been used for working out similar results.

7 Next. The nature of the patented invention, the
8 character of the commercial embodiment of it as owned and
9 produced by the licensor, and the benefits to those who have
10 used the invention.

11 The extent to which the infringer has made use
12 of the invention and any evidence probative of the value of
13 that use.

14 The portion of the profit or of the selling
15 price that may be customary in the particular business or in
16 comparable businesses to allow for the use of the invention
17 or analogous inventions.

18 Next. The portion of the realizable profits
19 that should be credited to the invention as distinguished
20 from non-patented elements, the manufacturing process,
21 business risks, or significant features or improvements
22 added by the infringer.

23 The opinion testimony of qualified experts.

24 And, finally, the amount that a licensor (such
25 as the patentee) and a licensee (such as the infringer)

1 would have agreed upon (at the time of or prior to the
2 infringement) if both had been reasonably and voluntarily
3 trying to reach an agreement; that is, the amount which a
4 prudent licensee -- who desired, as a business proposition,
5 to obtain a license to manufacture and sell a particular
6 article embodying the patented invention -- would have been
7 willing to pay as a royalty and yet be able to make a
8 reasonable profit and which amount would have been
9 acceptable by an prudent patentee who was willing to grant a
10 license.

11 No one factor is dispositive and you can and
12 should consider the evidence that has been presented to you
13 in this case on each of these factors. You may also
14 consider any other factors which in your mind would have
15 increased or decreased the royalty the infringer would have
16 been willing to pay and the patent holder would have been
17 willing to accept, acting as normally prudent business
18 people. The final factor establishes the framework which
19 you should use in determining a reasonable royalty, that is,
20 the payment that would have resulted from a negotiation
21 between the patent holder and the infringer taking place at
22 a time prior to when the infringement began.

23 Now we're coming down to the home stretch,
24 ladies and gentlemen.

25 Once you adjourn to the jury deliberation room,

1 the first thing I recommend you do is select a foreperson.
2 How you conduct your deliberations, however, is entirely up
3 to you. But however you conduct them, please remember that
4 your verdict must represent the considered judgment of each
5 of you, each juror.

6 It is your duty, as jurors, to consult with one
7 another and to deliberate with a view towards reaching an
8 agreement, if you can do so without violence to your
9 individual judgment. Each of you must decide the case for
10 yourself, but do so only after an impartial contribution of
11 the evidence with your fellow jurors. In the course of your
12 deliberations, do not hesitate to reexamine your own views
13 and change your opinion, if convinced it is erroneous. But
14 do not surrender your honest conviction as to the weight or
15 effect of evidence solely because of the opinion of your
16 fellow jurors, or for the purpose of returning a verdict.
17 Remember at all times that you are not partisans. You are
18 judges -- judges of the facts, not me. Your sole interest
19 is to seek the truth from the evidence in the case. In
20 order for you, as a jury, to return a verdict, it is
21 necessary that each juror agree to the verdict. In other
22 words, your verdict must be unanimous.

23 A form of verdict has been prepared, as you know
24 and should have. You will take this form into your jury
25 deliberation area. And when you reached unanimous agreement

1 as to your verdict, just have the foreperson fill in and
2 sign and date the form. You will then come back to the
3 courtroom, and your foreperson will be asked to hand the
4 form over to Ms. Walker, and she will announce your verdict.

5 It is proper to add the caution that nothing
6 said in these instructions and nothing in the form of
7 verdict is meant to suggest or convey in any way or manner
8 any intimation as to what verdict I think you should find.
9 What the verdict shall be is your sole and exclusive duty
10 and responsibility.

11 That concludes the part of my instructions
12 explaining the rules for considering the testimony and
13 evidence. Let me finish up by telling you how to
14 communicate questions or messages to the Court.

15 Once you start deliberating, do not talk to the
16 Jury Officer, or to my Chief Deputy Clerk, or to me, or to
17 anyone else except one another about the case. If you have
18 any questions or messages, you must write them down on a
19 piece of paper, sign them, and give them to the Jury
20 Officer. That individual will be stationed outside of your
21 deliberation area. The question will be given to me, and I
22 will respond as soon as I can.

23 Now, keep in mind I may have to talk to the
24 lawyers about what you have asked so it may take me a bit of
25 time to get back to you. Please be patient. Any questions

1 or messages, again, send them through your foreperson.

2 One more thing about messages. Do not ever
3 write down or tell anyone how you stand on your vote or
4 votes. For example, do not write down or tell anyone that
5 you are split on your vote, whatever the number might happen
6 to be. That should stay secret until you are finished.

7 Now that all the evidence is in, once the
8 arguments are completed, you will be free to return or go
9 back to your deliberation room and deliberate. It will, in
10 fact, be your duty to talk with each other about the
11 evidence and to make, as I told you, every reasonable effort
12 to reach a unanimous agreement. Talk with each other,
13 listen carefully and respectfully to each others view's,
14 keep an open mind as you listen to what your fellow jurors
15 have to say.

16 Try your best to work out your differences. Do
17 not hesitate to change your mind if you are convinced that
18 other jurors are right and that your original position was
19 wrong.

20 Again, don't change your mind, ever, just
21 because other jurors see things differently or just to get
22 the case over with. In the end, your vote must be exactly
23 that -- your own vote. It is important for you to reach
24 unanimous agreement, but only if you can do so honestly and
25 in good conscience.

1 No one will be allowed to hear your discussions
2 in the juryroom, and no record will be made of what you say.
3 So you should feel free to speak your minds.

4 Listen carefully to what your fellow jurors have
5 to say, and then decide the case for yourselves.

6 Let me finish up by repeating something that I
7 said several times; and that is that nothing I have said or
8 done during this trial was meant to influence your decision
9 in any way in favor of either party. You must decide the
10 case for yourself based on the evidence presented.

11 Does any member of the jury need a break?

12 (Jurors indicate no.)

13 THE COURT: Are you sure.

14 (Jurors indicate yes.)

15 THE COURT: Do counsel need a break? Are we
16 okay?

17 MR. NATHAN: I just need a minute to set up a
18 few things.

19 THE COURT: Okay. All right. Then we'll go
20 right into our arguments.

21 (Pause.)

22 THE COURT: Counsel, before you start, let me
23 see Mr. Nathan and Mr. Van Nest briefly at sidebar. It
24 doesn't need to be on the record.

25 (Brief discussion held off the record.)

1 THE COURT: Ladies and gentlemen, we're going to
2 need a few more minutes to set up so let's take a break.

3 (Brief recess taken.)

4 THE COURT: All right, Ms. Walker.

5 So, counsel, I think what we should do is use
6 the courtroom clock. And I will alert you at the ten minute
7 mark. So for you, Mr. Nathan, that is going to be in the
8 area of 11:18 or so. Okay?

9 MR. VAN NEST: 35 minutes.

10 THE COURT: He is going 45 minutes. Yes, I will
11 alert Mr. Nathan at the 35 minute mark.

12 (Jury returned.)

13 Ladies and gentlemen, please take your seats.

14 THE COURT: All right, counsel.

15 Please be seated in the well of the court as
16 well.

17 Mr. Nathan.

18 MR. NATHAN: Thank you, Your Honor. May we put
19 up the chart?

20 THE COURT: You may. Yes, indeed.

21 (Easel board set up.)

22 MR. NATHAN: Thank you, Your Honor.

23 Good morning, ladies and gentlemen.

24 Your Honor, I'd like to thank a number of people
25 starting with yourself for the courtesies that you have

1 extended during this trial.

2 I'd like to also thank members of the jury for
3 your attentiveness and your service. I have actually sat on
4 three juries. I know how tough it is to sit here day after
5 day, take notes, pay attention; and I really appreciate it,
6 and I know I speak for both sides.

7 I'd also like to thank the young lawyers in this
8 courtroom on both sides. You have not seen what they have
9 been doing in the evening preparing all these slides, all
10 this evidence, all these binders. Many of them have gone
11 without sleep for days on end. Many of them did not have a
12 chance to speak with you and to you during this trial, but
13 they're all very fine lawyers, and their day will come, and
14 I want to express my appreciation.

15 Let me start where I left off when we spoke last
16 in opening, taking you back to 1990 when these three doctors
17 had a crazy idea.

18 Dr. Rothman testified about it yesterday that
19 there was immense skepticism that would have been engendered
20 by this.

21 Dr. Hasenkam himself testified that when
22 Dr. Andersen came and told him about the idea, he thought it
23 was wild.

24 And Dr. Andersen testified that it was crazy.

25 Well, that crazy idea is the reason why Justin

1 is still alive today.

2 This is something that happens once in an
3 inventor's lifetime. You recall Dr. Hasenkam talking about
4 this being an inventor's dream, a researcher's dream.

5 Now, how did they do this? You have seen
6 prototypes. You recall they had no budget whatsoever. They
7 had to scrounge around the hospital. They had used
8 balloons, used catheters. They grabbed whatever wire they
9 could out of the operating room. That's why they used the
10 .55-millimeter wire. That is why that wire is in the
11 patent. That is all they had.

12 And it worked. Dr. Cribier testified that this
13 was an unbelievable achievement. And you will recall
14 Dr. Rothman who testified yesterday spoke about the stature
15 of Dr. Cribier.

16 Dr. Cribier, you will recall, was the first
17 person to ever place an aortic valve in a human being using
18 a catheter. He was the first-in-man doctor and he thought
19 this was an amazing achievement.

20 Now, there are others who felt the same way.

21 CoreValve's principal doctor, Dr. Grube -- I
22 always worry about mispronouncing -- wrote a paper in 2005,
23 a few years ago: Treatment of aortic disease with
24 percutaneous transluminal implantation of stent-based valve
25 prosthesis have been introduced and successfully tested in

1 animal models -- successfully tested. And the reference was
2 to the Andersen paper.

3 And Dr. Seguin who was here testified that as
4 far as he knew, that was an accurate statement.

5 Now, you heard yesterday about this great big
6 textbook, the Bailey textbook. He appraised the invention
7 in 1994, and described it as the most exciting published
8 work in this area to date is the investigations of Andersen,
9 et al from Denmark, published in 1992. Again, the reference
10 to the '92 paper.

11 And he was very prophetic in his forecast.
12 Because he said, in 10 years, we shall very probably look
13 back on the pioneering work described above in the same way
14 with respect the work of Hufnagel, Gruentrig, and Palmaz.

15 Palmaz being the inventor of the Palmaz stent.
16 That is what Dr. Bailey wrote. And he was right.

17 2004, Edwards had purchased PVT and had gone
18 down the track with SAPIEN and, of course, CoreValve.

19 Now, CoreValve's own expert, Dr. Rothman, you
20 heard him testify yesterday, appraised the invention when he
21 testified in another case for a company called Cook. And he
22 spoke about this very same Andersen patent.

23 "Question: Did you testify on behalf of Cook
24 about Andersen as follows?

25 "Answer: Yes, I think there are some things,

1 ideas in Andersen that actually sound quite interesting and
2 I quite like his concept for trying to avoid the coronary
3 ostia, you know, these apices where you try and get them to
4 avoid covering the coronary ostia, is a good idea."

5 That was Dr. Rothman, CoreValve's own expert.

6 He also testified that there was tremendous
7 resistance that the inventors met. Why? Because the
8 cardiac surgeons didn't want to have this idea
9 commercialized.

10 There was plenty of testimony that CoreValve
11 itself praised the '552 patent and the invention.

12 You will recall that Dr. Seguin was here, and he
13 affirmed that when he spoke with analysts in 2005 -- these
14 are people he was trying to convince to invest in his
15 company. That he said very clearly the Andersen patents
16 have been shown as being a very strong patent -- a very
17 strong patent. This is what Dr. Seguin told the analysts in
18 2005. And he affirmed that, indeed, he had uttered those
19 words.

20 And his partner, Georg Bortlien, who founded
21 CoreValve, also said that it was very important. He was
22 monitoring that PVT had acquired the Andersen rights.

23 And then the actual designer of the CoreValve
24 GEN 3 device, Than Nguyen, testified that he admired
25 Dr. Andersen very much.

1 You will see back in the juryroom -- you will
2 have a chance to look at it -- the inventors were awarded
3 the '552 patent. This is what it looks like. It's
4 Plaintiffs' Exhibit 1. You will have a chance to see it.
5 You will find on the inside, it's an original copy of what
6 you have in your original jury notebook at Tab 1.

7 Now, the inventors knew that they were not able
8 to commercialize this. Very self-effacing, Dr. Hasenkam
9 described himself as simple doctors. That is not exactly
10 how I would describe them, but he did say we were not design
11 engineers. They weren't manufacturers. They needed help.

12 You heard about they spent three years trying to
13 find a partner, from 1990 to 1993. And, ultimately, they
14 found Stanford Surgical, which became Heartport. And
15 Stanford Surgical and Heartport did absolutely nothing for
16 seven years. So they lost three years searching for a
17 partner and seven years while the partner did nothing.

18 Dr. Andersen wrote a letter, and you will find
19 it in Plaintiffs' Trial Exhibit 565: I feel that you are
20 doing nothing.

21 That is what he wrote to Heartport.

22 And just by coincidence, Dr. Hasenkam was on
23 sabbatical, was at Stanford and he went over to Heartport.
24 And he asked, show me what you have done with my invention
25 -- our invention. What have you got to show me?

1 I took the opportunity to visit Heartport
2 myself. We asked to see what level of development they had
3 come to so far that they couldn't. They hadn't done
4 anything. We were extremely frustrated.

5 They lost ten years while the invention was in
6 the hands of Heartport.

7 Then, as I said to you in opening, there was a
8 breakthrough. The small company PVT in Israel got rights to
9 the Andersen patents from Heartport.

10 You will remember Stan Rowe testified yesterday
11 that he paid a king's ransom for the Andersen patent -- a
12 king's ransom. He said I put my money -- we voted with our
13 money. And, actually, he put a figure on it. 20 percent of
14 the money that PVT had went into buying the rights to the
15 Andersen invention.

16 And within two years, they took that patent,
17 built a device and placed it in a human being. And that, of
18 course, is Dr. Cribier's first-in-man in April of 2002.

19 There was testimony in this case, uncontradicted
20 by the defendant, that the '552 patent covers the ultimate
21 device that emerged from PVT and Edwards, the SAPIEN device.

22 Mr. Wood testified that Edwards paid royalties
23 to Drs. Andersen, Hasenkam and Knudsen for the rights to
24 sell and make the SAPIEN device. And the '552 patent is
25 actually marked on the box and on the instructions of the

1 SAPIEN device.

2 All told, you heard from Mr. Wood that Edwards
3 invested over \$400 million to bring this product to market
4 not only in terms of the acquisition of PVT, the acquisition
5 of the Andersen patent, the clinical studies, all the
6 associated expenses. They sunk \$400 million into this.

7 That is what the Edwards' side of the room did.
8 Let me now turn to the CoreValve side of the room. And to
9 do that, I have to talk about Dr. Seguin.

10 You will recall that Dr. Seguin testified that
11 he had this idea. He had a revelation in the early '90s --
12 '92, '93, '94 -- that this could be done without open heart
13 surgery. That it would be possible to do this with a
14 catheter.

15 And you heard him affirm that he hasn't got a
16 scrap of paper that would back up his story that he had done
17 this, anything on this before 1995. Absolutely nothing.
18 The testimony was clear and uncontradicted on that.

19 What was also clear, and it has been admitted by
20 CoreValve, that he actually got a copy of the '552 patent in
21 1996. He studied it. He had it. That was the first
22 activity in the case that has been documented about what
23 Dr. Seguin did.

24 Not only did they know about the patent, they
25 also praised it over and over again; not only Dr. Seguin but

1 George Bortlien and Than Nguyen.

2 CoreValve also knew about the very first
3 article, the '92 article, which you have heard about over
4 and over again. And I urge you to consider looking at that
5 article. It's Plaintiffs' Trial Exhibit 477.

6 Dr. Seguin got a copy of that article and he
7 studied it. Georg Bortlien got a copy of that article and
8 he studied it. What did they do?

9 They set up a plant to have a single product
10 with a single strategy: make the product, and then have an
11 exit strategy. Infringe, and sell it. And that's what
12 happened.

13 You heard that Dr. Seguin moved the company to
14 Irvine. You also heard that he now lives in England and
15 France. He made the company, set it up, he infringed, and
16 then he left, having sold the company for 700 million
17 dollars plus the possibility of another 150 million dollars.

18 In the middle of all this, Edwards found out
19 about some of this activity and wrote a formal letter to Dr.
20 Seguin, not to just anybody within CoreValve. The letter
21 was addressed to Dr. Seguin himself.

22 And you heard Dr. Seguin say -- actually, let me
23 give you the citation on it. It's Plaintiffs' Trial Exhibit
24 155.

25 And I should have said in the opening that you

1 will be given all these exhibits and have an opportunity to
2 look at them.

3 Take a look at Plaintiffs' Trial Exhibit 155
4 where this letter came in. And Dr. Seguin never answered
5 that letter. Yes, he said he had a conversation with the
6 CEO of Edwards. But did he ever give an explanation? Was
7 there any testimony of the explanation of why they didn't
8 infringe or why the patent was invalid? That's what the
9 letter called for. "We would appreciate hearing your
10 explanation."

11 None was ever given. They have an explanation
12 in this courtroom. Why didn't they give it then? The
13 answer is they didn't believe that they had that
14 explanation.

15 What did they do? They moved the company.

16 You have heard counsel say during opening that
17 they went in a different direction, with different
18 technology. I agree, they went in a different direction.
19 They went from Paris to Irvine. They moved the entire
20 company to Irvine in order to be able to commercialize it in
21 this country, using the local talent. And, remember, there
22 was only one place in the world where they had that
23 combination of engineers and that clean room from VenPro,
24 and that was in Irvine.

25 Not only did they go to Irvine, they never

1 considered moving out of Irvine in 2005, 2006, 2007. The
2 lawsuit, the one that brings us here today, was filed in
3 February of 2008. And CoreValve then considered moving
4 offshore. They investigated it. You heard that from
5 witness after witness, Mr. Michiels, Mr. Kinrich, and
6 others. And they decided not to move.

7 What did they do? They doubled down. They
8 actually built a new plant right across the street from
9 their existing plant, in order to reaffirm their plan to
10 make as much product as they could, as fast as they could,
11 in order to sell the company. And, of course, the motive
12 was money. And, of course, the plan worked. They sold so
13 much Generation 3 product that they were able to sell the
14 company to Medtronic for the 700 million dollars, and then
15 they left the country.

16 Now, there has been a number of defenses that
17 have been raised. The Judge has mentioned them to you.

18 One of the things I should say at the outset, I
19 showed you a picture of George Washington's signature on the
20 very first patent that was ever issued in this country back
21 in 1790. Patents have been part of our tradition, our
22 Constitution, for over 200 years. They are designed to stop
23 just this kind of conduct. That's what patents are for.

24 When you read the original patent, you will see
25 right on the front cover, it says, "Therefore, this United

1 States patent grants to the persons having title to this
2 patent," which is Edwards, "the right to exclude others from
3 making..."

4 It's right on the front of the patent. That's
5 what patents are for.

6 You heard Mr. Wood testify that if people can do
7 this kind of thing, medical companies will not make the
8 investments in order to bring these products to market. And
9 then you can imagine the effect that would have had on
10 patients like Justin and others.

11 Now, they say, well, the patent, it was not
12 enabled, the patent was no good. That is what they say in
13 this courtroom. You will recall earlier, they told the
14 analysts that it was strong.

15 The patent has been presumed valid. You heard
16 that this morning in the Judge's instructions. And if you
17 look in the instructions on Page 25, you will see the test
18 for enablement is set forth with great clarity by the
19 Judge:

20 The important thing to remember is that routine
21 experimentation, routine engineering, is not undue
22 experimentation. The test is whether or not one could have
23 picked up the patent and built what is claimed.

24 Let's talk about what is claimed.

25 Do you remember, I went through the 12 parts of

1 the claim. What we heard over and over and over again in
2 this courtroom was, well, I cannot use this patent to make
3 an 18 size French device small enough to go in the femoral
4 artery.

5 The claim does not have anything in it about
6 size.

7 You can read that claim from now to eternity,
8 you will not see French sizes. You will not see 18 size.
9 You will not see anything.

10 What has happened here in this courtroom is that
11 CoreValve, in order to excuse their conduct, has read that
12 into the patent. It's not there. What they are doing is
13 rewriting the claim.

14 Now, was it successful? Their own doctor, Dr.
15 Grube, wrote that it was successful.

16 I thought it would be interesting to bring up a
17 slide they showed during opening about the Wright Brothers.
18 They described this as an enabled invention. Well,
19 actually, my law firm represented the Wright Brothers. I
20 want to make it perfectly clear, I wasn't involved in that
21 case. As old as I am, I wasn't involved. But I know a lot
22 about it. And I know that the very first flight that they
23 did -- and there is a picture, it is the most famous
24 photograph in the history of aviation -- lasted for 12
25 seconds, and it went 120 feet. 12 seconds, 120 feet.

1 What that means is that if the plane had been
2 sitting on the end of a 747 and it took off there, it would
3 have landed before it got to the other wing tip. That's how
4 short it was.

5 But it was enabled, according to CoreValve. It
6 was an enabled invention. People attacked the Wright
7 Brothers' patent, just like the Andersen patent is being
8 attacked here. They lost.

9 The point is that the Wright Brothers, 12
10 seconds and 120 feet later, were the fathers of aviation.

11 These doctors, working with their own hands,
12 putting this successfully into pigs, are the fathers of THV.
13 Every single witness testified about that, Dr. Cribier, Dr.
14 Bailey, and the others.

15 Now, let me talk a little bit about
16 infringement. You will recall -- and I should also say that
17 the experience that CoreValve had was comparable to the
18 experience that PVT had.

19 Yes, they spent a lot of time with all these
20 models that they built in France. But those models were all
21 built by Dr. Seguin after 1999, Georg Bortlien, who came
22 from the banking industry, and two students. Not to run
23 down the French students, but they were not persons of
24 ordinary skill in the art.

25 What happened was they turned it over to ADMEDES

1 in Germany. And within six months, this is Georg Bortlien's
2 own testimony, they built Generation 1, in six months.

3 When they turned it over to people who knew what
4 they were doing, it was not a problem. In this courtroom,
5 they are telling you that it took years.

6 Now, let me talk about literal infringement.

7 You will recall -- I know you are sick of
8 hearing my voice on this subject -- about the 12 parts. But
9 it's very important.

10 Dr. Buller broke down the parts of the claim
11 into these 12 parts. I asked Dr. Rothman yesterday, their
12 own witness, how many of these parts are we fighting about?
13 And he said that there were only two. Only Part 4 and only
14 Part 9. Parts 1, 2, 3, 5, 6, 7, 8, 10, 11 and 12, he
15 admitted, are all in the CoreValve device.

16 The only issue is whether the CoreValve device
17 has a stent comprising, meaning including, a cylindrical
18 support means.

19 What you heard from the Judge this morning in
20 his final instructions, that cylindrical support means
21 doesn't mean a rigid, perfect cylinder. You will find that
22 in the final instructions on Page 17, Page 4, and it's also
23 in your juror notebooks, which have been updated to include
24 the Judge's instruction. You will see that in Tab 3, Page
25 1.

1 I would like to reiterate it for emphasis:

2 The term cylindrical does not mean that the
3 object described must be a cylinder with a diameter that is
4 constant along its length or longitudinal axis. That is a
5 perfect cylinder.

6 To put it another way, the Judge's instructions
7 read, The term cylindrical as used in the patent in this
8 case does not require the presence of a perfect geometric
9 cylinder.

10 Now, did Dr. Rothman, who contested whether or
11 not it had a cylindrical support means, follow that
12 instruction? The answer is no. He said in his testimony,
13 Is it your testimony that when the claim calls for something
14 cylindrical it means a perfect cylinder?

15 Dr. Rothman: Well, I tend to think of a
16 cylinder having a distance between the sides, the opposite
17 sides, that the diameter remains constant.

18 He was talking about a perfect cylinder.

19 And witness after witness after witness for
20 CoreValve, the model, they held that up, and said, gee, the
21 bottom slopes like this and therefore it is not cylindrical.

22 The claim doesn't use the term cylinder. You
23 can read that from now until eternity. The claim says
24 cylindrical. And cylindrical does not require a perfect
25 cylinder.

1 On top of that, Dr. Pinchuk, another expert for
2 CoreValve, testified that, indeed, there was a cylindrical
3 support means in the CoreValve device.

4 Now, we heard witness after witness for
5 CoreValve talk about Figure 1 and Figure 2. I am sure you
6 are never going to want to hear the term preferred
7 embodiment again as long as you live.

8 I think we can agree that Figures 1 and 2 come
9 in the section of the patent under the preferred embodiment.
10 And the Court has instructed you this morning that the scope
11 of the claim is not limited to the preferred embodiment
12 shown in the claim. And on top of that, every expert who
13 testified, the one point they agreed on -- Dr. Buller, Dr.
14 Pinchuk, and Dr. Rothman -- is that the claim is not
15 restricted to the preferred embodiment.

16 What that means is that when you go through that
17 claim, you will not see .55-millimeter wire. You will not
18 see anything like the preferred embodiment, because the
19 claim is much broader.

20 You will recall that Dr. Buller, who was here,
21 testified at length, and then came over to the Elmo that was
22 set up on the side. And he actually did these drawings.
23 And you will find those in your juror notebooks at Tab 6,
24 the drawings, color copies have been provided for you.

25 And he demonstrated where the cylindrical

1 support means was. And, yes, it is slightly tapered on the
2 bottom. But the Judge's instructions make it clear that the
3 word cylindrical support means does not require it to be
4 absolutely vertical. And so there is no dispute or can be
5 no dispute that there is the absence of a cylindrical
6 support means.

7 Now, let's go to commissural supports.

8 This is Item No. 9. First of all, if I could
9 have -- I guess I can do it myself. Item No. 8, a plurality
10 of commissural supports. Both Dr. Rothman and Dr. Pinchuk
11 conceded that the CoreValve device has commissural supports.
12 So there is no question about that.

13 The only issue in the case remaining is whether
14 they project from one side of the cylindrical support means
15 in a direction generally parallel to a longitudinal axis.

16 Now, we heard over and over and over again words
17 like projections, posts, protrusions, towers. Remember
18 that? Over and over and over again. Those words do not
19 appear in the claim. What appears in the claim is in Item
20 No. 8, a plurality of commissural supports, which they
21 agreed they have, and the only thing that is required in No.
22 9 is that they project from one side of the cylindrical
23 support means in a direction generally parallel.

24 Well, Dr. Buller drew that for you. The
25 cylindrical supports is the green structure. And you will

1 recall, when Dr. Rothman passed around the actual sample,
2 the \$20,000 sample that he opened up, that you could
3 actually look down the side and see where the commissural
4 points were, and that's where these tabs are, and he
5 identified this green structure which projects, not
6 projections, but projecting from the cylindrical support
7 means upwards towards the ceiling.

8 Indeed, the top of the commissural supports kind
9 of look like an arrow, pointing up. And that's what he
10 identified.

11 Now, probably this is the most famous fork in
12 the history of patent litigation. This is the actual fork
13 that was used by Dr. Buller and is in the graphics. He
14 talked about how, if I point this at you -- you will forgive
15 me -- this is pointing in a direction generally parallel,
16 even though it has a bend in it. That is exactly what
17 CoreValve has.

18 The commissural supports are actually, as a
19 totality, they actually project in a direction generally
20 parallel to that axis.

21 Now, CoreValve has seized on one point. They
22 say 30 degrees. That is not what the claim calls for. The
23 claim calls for a cylindrical support means projecting
24 generally -- in a direction generally parallel.

25 What that means is the entirety of the

1 cylindrical support means not the neck of the fork, but the
2 entirety of it. That's what is important. You can read
3 that claim, again, for the next two weeks. You will not see
4 anything about 30 degrees in there or anything of that sort.

5 Now, let me take you to the doctrine of
6 equivalents.

7 Given the fact that Item No. 4 has been conceded
8 by Dr. Pinchuk, that there is a cylindrical support means,
9 the only question then is, that we are debating here, is
10 Item No. 9. And if you do not believe the fork analogy,
11 then it is our submission that they have the equivalent of
12 Item No. 9.

13 Dr. Buller identified the function, way, and
14 result that Item No. 9 is carried out in the CoreValve
15 device. The function is to support commissural supports
16 away from the base. Well, that green material that he
17 identified surely supports the commissural points away from
18 the base, meaning the blue box, the cylindrical support
19 means.

20 How is it done? It is done in a way having a
21 non-uniform wall structure. You remember the smaller cells
22 at the bottom and the bigger cells at the top, exactly like
23 Dr. Andersen, Hasenkam and Knudsen. And also, there was
24 less stiffness at the point of attachment.

25 And CoreValve made a big fuss about this, how

1 the top is more easily squeezed together than the bottom.

2 All three elements were there, the function,
3 way, and result.

4 Now, we heard at great length about CoreValve's
5 own patents. Dr. Seguin and Georg Bortlien both identified
6 these as anchor patents. You will recall that CoreValve's
7 device, Dr. Seguin was very proud about it. This is the
8 drawing Dr. Seguin actually made in the courtroom.

9 And for the record, it's Defendant's Trial
10 Exhibit 1481.

11 And you recall that he made it over there at the
12 board, and he talked about how it had an anchor at the
13 bottom, and it had an anchor at the top, and it had some
14 wires in between.

15 The important thing is that the guts of the
16 Andersen invention was there: the stent and the valve,
17 exactly where Drs. Andersen, Hasenkam and Knudsen put it.

18 And so if you believe that they were entitled
19 to a patent on the lower anchor, and a patent on the top
20 anchor, that does not excuse them from using the guts of the
21 invention which was where the valve was.

22 Now, we also heard that the Patent Office
23 granted these anchor patents over the Andersen patent. Not
24 one witness for CoreValve answered my question, did the
25 Patent Office ever consider whether the GEN 3 device was

1 covered by Andersen.

2 Well, you can take a look at the file history of
3 the anchor patents. They're the great big thick ones that I
4 had Dr. Rothman look at.

5 The GEN 3 device was never before the Patent
6 Office. They never considered the question that you are
7 considering about whether or not those 12 parts are in this
8 product. All they considered was whether or not they're
9 entitled to their anchor in the patents.

10 Let me talk a little bit about willful
11 infringement. And, actually, I should mention just the
12 analogy that I used in opening: That if you believe that
13 Dr. Seguin actually invented the lower anchor and the top
14 anchor, all he did was add to the infringing device, which
15 is here. Think of this as the pencil and you can think of
16 this as the eraser. That is what Dr. Seguin did.

17 Now, with respect to willful infringement, we
18 certainly appreciate that this is our obligation to show you
19 by clear and convincing evidence. And we believe the record
20 is clear.

21 First of all, you will recall that this was a
22 single product company designed to infringe Edwards patents;
23 and indeed they did that. Only GEN 3 has been commercialized.
24 Only GEN 3 has been sold. And Dr. Seguin has not a scrap of
25 paper to back up his story that, indeed, he thought of this

1 on his own, without being prompted by Dr. Andersen's patent
2 and publications.

3 A warning letter was sent. It wasn't answered.

4 Internally, they were praising the patent.
5 Externally, they were telling the analysts from Wall Street
6 that it was very strong. And no one came forward to testify
7 on behalf of CoreValve that indeed they thought the patent
8 was invalid.

9 You will recall that when he spoke to the
10 analysts, he said the patent was very strong. And I urge
11 you to take a look at this analyst call. It's Plaintiffs'
12 Trial Exhibit 168. And on the top of the page, he said that
13 the patent was very strong. And on the bottom of the page,
14 he said, but don't worry because our patent attorneys tell
15 us we don't infringe, and don't worry, the VC attorneys --
16 that means the venture capitalists -- the investors, their
17 attorneys tell us we don't infringe.

18 Not one attorney for CoreValve took the stand
19 to testify about their noninfringement. Not one venture
20 capital attorney took the stand to tell that story to you.
21 Not one video was played to you by an attorney saying we did
22 an analysis, they don't infringe. And there is no evidence
23 that they ever obtained such an opinion.

24 What did they do? They were clever businessmen.
25 They knew how expensive it was going to be to move overseas.

1 You have heard not only Mr. Michiels but you heard the
2 experts talk about that. And so they doubled down in
3 Irvine, and now in this courtroom they say, well, we could
4 have moved. It was really simple, something that could have
5 been done very easily.

6 THE COURT: You have ten minutes, Mr. Nathan.

7 MR. NATHAN: Thank you, Your Honor. I'm very
8 close, even under my clock.

9 They say they could have done it, but indeed
10 they didn't do it. What they did was to cash out and get
11 the \$700 million.

12 Now, I showed you this slide in the opening.
13 The sales, as least as of March 15th, the last time we got
14 records from CoreValve when they made projections, was \$148
15 million. And that Edwards damages we are asking you to
16 award is \$75 million. That is \$75 million that should be
17 taken into account for a company that was bought for \$700
18 million by Medtronic.

19 Now, there is no question that the sales
20 absolutely rocketed once they got CE approval in March of
21 2007. And you can just look for yourself. These are all
22 taken from CoreValve's actual sales. And it's just going --
23 you can imagine where it's going to be if this kind of
24 conduct is not stopped.

25 Larry Wood took the stand and talked about the

1 harm that Edwards had suffered. They lost transfemoral
2 sales, SAPIEN sales. They lost transapical sales. He
3 testified at length about how he and his company had the
4 capacity to make the sales that they lost. They lost the
5 first mover advantage. CoreValve locked up doctors and
6 hospitals that Edwards then would have trouble getting into.

7 You've heard that testimony from Mr. Wood. He
8 testified at great length about the details of the capacity,
9 the ability to make the sales that CoreValve made. He was
10 examined vigorously by counsel from the other side. They
11 had an opportunity to examine him on it. And he maintained
12 that, indeed, Edwards had the capacity.

13 Now, I want you to weigh that testimony by
14 Mr. Wood and also Greg Leonard, our expert, against
15 CoreValve's expert, Mr. Kinrich. He relied on his figures
16 on an unknown, unseen, non-testifying Medtronic employee who
17 didn't come here for all of his data. And when the smoke
18 cleared, he said that all that Edwards is entitled to is one
19 percent, which is less than \$2 million, for a company that
20 had one product that was sold for \$700 million.

21 And, by the way, with respect to people who came
22 forward, I believe you are going to hear from my colleague
23 that a lot of Edwards' witnesses weren't here, like
24 Dr. Andersen, Dr. Knudsen and others. They were all here.
25 They were all on video and they were all examined. The

1 voices who asked those questions were CoreValve's lawyers.
2 Be sure there is no mistake about that.

3 Now, finally, I'd like to -- if I can switch to
4 the verdict form. The judge has granted us permission to
5 take you through it.

6 It's really, compared to most patent trials that
7 I've been involved in, it is user friendly. There are only
8 five pages, and there are only six questions, which is great
9 news for you and it's great news for us.

10 And the first question is: Has Edwards proven
11 by a preponderance -- I don't know if I can get the focus in
12 a little better.

13 THE COURT: That's good.

14 MR. NATHAN: That's good.

15 Has Edwards proven by a preponderance of the
16 evidence that the CoreValve Generation 3 ReValving system
17 literally infringes all 12 parts? Are they literally there?

18 Remember, they contest only two. No. 4 is
19 "cylindrical" and it doesn't require an absolute perfect
20 cylinder. And the one that they do contest is the
21 "projecting in a direction generally." And I want you to
22 remember the fork when you consider that.

23 If you answer that question "yes" for Edwards --
24 and we hope and we urge you to do so -- then you don't have
25 to go to the doctrine of equivalents. That is the end of

1 the infringing inquiry.

2 The instructions will tell you if you answered
3 "yes" to that, you can then skip Question No. 2.

4 If you answered "no" to Question No. 1, there is
5 no literal infringement, which is your prerogative and right
6 to do so, then you have to go to Question No. 2 and answer
7 the question.

8 Well, maybe there is something about this that
9 is not in there literally but is it in there under the
10 doctrine of equivalents?

11 And that question would be answered, we urge
12 you, in the affirmative, "yes."

13 The next question is very simple:

14 If you have found infringement under either one
15 of these tests, either literal infringement or doctrine of
16 equivalents, has Edwards proven by clear and convincing
17 evidence that infringement was willful?

18 And we submit that the evidence shows that that
19 was the case.

20 And you go to Question No. 4: Has CoreValve
21 proven by clear and convincing evidence that Claim 1 of the
22 '552 patent is invalid because it is not enabled?

23 And you remember, the test here is the patent is
24 presumed valid. They have to show by clear and convincing
25 evidence. And we submit that they have not done so and that

1 question we submit should be answered "no."

2 And then, finally, if you have found that
3 CoreValve has infringed Claim 1 of the patent, either
4 literally or under the doctrine of equivalents, one or the
5 other, what is the amount of damages?

6 Now, you will recall that I said at the very
7 outset, we are not claiming that we would have made every
8 sale. Remember, CoreValve got on the market first before we
9 were on the market, so there was a beginning segment we
10 couldn't make and there were some or things that we couldn't
11 make.

12 But if you look at Dr. Kinrich's analysis, it
13 is our submission that Edwards is entitled to \$72 million in
14 lost profits. \$72 million.

15 And for those sales it could not make -- which
16 is Question No. 6. For those CoreValve infringing sales for
17 which you did not award Edwards lost profits, what is the
18 amount of reasonable royalty?

19 And I'm just using \$73 on this figure,
20 \$2 million for that. And that is where the \$75 million
21 figure comes from.

22 Did I make it within the 45 minutes?

23 THE COURT: You did so. Thank you. Do you need
24 to set up?

25 MR. VAN NEST: Just a minute. If I could ask

1 someone to take down the board? It will take just a moment.

2 (Board taken off easel.)

3 THE COURT: Mr. Van Nest.

4 MR. VAN NEST: May I proceed, Your Honor?

5 THE COURT: You may proceed.

6 MR. VAN NEST: Thank you very much.

7 Good morning, ladies and gentlemen.

8 This is my final opportunity to address you.

9 And I know that is a lot more painful for me than for all of
10 you.

11 You have been sitting here very patiently for
12 the last couple of weeks, one of the most attentive juries
13 we've seen. And the notes taking and on time, it's
14 incredible. We really do appreciate it.

15 I want to point out today is April 1st. April
16 Fools. And I'm a big April Fools Day fan. I normally play
17 a gag or two in the office. I thought about coming in this
18 morning and standing up here and announcing that the defense
19 waives their closing argument.

20 I asked Mr. Shaw whether he thought that would
21 be a good idea. He said, you will never see Judge Sleet
22 move faster to the gavel. (Laughter.) So I decided not to
23 take that chance.

24 And if we could have the first slide up.

25 This is where I left off in the opening. This

1 is where I want to start the closing.

2 There are really two issues, and I want to focus
3 the time I have with you on those two issues.

4 Issue 1. CoreValve does not use the Andersen
5 patent. And we have proven that in spades, as I will go
6 through in a minute.

7 And the Andersen patent doesn't teach how to
8 build or use a transcatheter heart valve in a human being.
9 We've proved that, too. I will spend a few minutes on that
10 at the end of my presentation.

11 The fundamental point that we've been trying to
12 drive home, through all our witnesses and all the exhibits
13 and all of the evidence which I'm going to review in just a
14 moment, is that the CoreValve product which you have seen
15 now many times is a fundamentally different approach to
16 building a replacement heart valve than anything called for
17 in Claim 1 of the Andersen patent. It's a different shape.
18 It's a different structure. It works in a fundamentally
19 different way.

20 As you can see, there are no projections, no
21 projecting supports whatsoever. Nothing is supported at a
22 parallel angle. And it's intended to be, designed to be a
23 cone, two cones actually, with a waist in the middle, not
24 something that is cylindrical.

25 So for all those reasons, as we will see when we

1 walk through the real relevant stuff, which we didn't hear
2 about really from Mr. Nathan, is the claim, elements of the
3 claim, when we walk through those, you will see that that
4 fundamental difference really informs your decision on
5 whether or not this device meets all the elements of Claim 1.

6 The second point I want to make is that this
7 device was independently developed - independently developed
8 by some very smart people who are inventors and leaders in
9 their own right. And we brought, for your consideration,
10 into this courtroom our whole invention story. All four
11 of our major inventors: Dr. Seguin, Mr. Bortlien, Rob
12 Michiels. Than Nguyen was unable to travel here. He
13 appeared on video.

14 We showed you the prototypes. We showed you the
15 history. We showed you the lab notebooks. We showed you
16 the design notebooks. We showed everything, even those
17 first two crummy prototypes that Dr. Seguin gave to Bortlien
18 back in '99.

19 There isn't a scrap of evidence in any of that
20 that this device was somehow copied or was based on the
21 Andersen patent. Where is the evidence of that? Where is
22 the document that shows these guys copying something from
23 Dr. Andersen's patent?

24 The evidence actually is the reverse.
25 Mr. Bortlien testified that they were very careful not to

1 use the Andersen patent, and they didn't use the Andersen
2 patent, as the final product attests.

3 As part of that independent development,
4 Dr. Seguin, Mr. Bortlien, they got their own patents. They
5 didn't get them through any trickery or deceit. I mean they
6 showed the Patent Office that Andersen has a patent. Here
7 it is. They discussed it in the patent, as we'll look at in
8 a minute. We're different. His patent has limits, has
9 problems. Our invention is intended to overcome those
10 problems.

11 Now, it's true that the Patent Office doesn't
12 decide infringement. That is something that only you
13 decide. But the Patent Office does decide whether you're
14 entitled to your own patent. Are you new and novel over
15 what already exists? So they made a determination that this
16 was new.

17 What else?

18 We end up with a great product. Not only that,
19 it's very different from Andersen and very different from
20 SAPIEN, too, as you heard Dr. Manoharan talk about, smaller,
21 easier to get in the femoral artery, different shape, more
22 forgiving for the surgeon, for the cardiologist, easier to
23 use, repositionable.

24 If we were all just using knockoffs or copies of
25 Andersen, how come our products are so different and why is

1 CoreValve the leader, why does CoreValve have the technology
2 that Edwards is trying to catch up to?

3 Okay. Let's get down to the devices.

4 Can I have the next slide up.

5 You have seen this a few times, you will
6 remember. This is, really, what were the problems for all
7 of these people in developing a valve? And what solution
8 did they attempt to come up with?

9 I would like to lift for the last time, I hope,
10 Your Honor, this magnet board, and start right there.

11 Can everyone see that? You have seen it a few
12 times.

13 Okay. This is a replica of Figure 1, built to
14 scale, from the Andersen patent.

15 Yes, I know, it is a preferred embodiment. But
16 I will point out, we will see in a minute it is the only
17 preferred embodiment that the inventors or the patent ever
18 talks about. That is what the Andersen patent Claim 1
19 discloses.

20 So what is it? As you can see, it is a short
21 device. It sits in the annulus. So it's cylindrical. As
22 you heard Dr. Rothman describe yesterday, it is intended to
23 stay put by radial force only. This is a cylinder. It's
24 not a cone. There is no anchoring device down here. It's
25 not tall, so it doesn't worry about the coronaries because

1 it's short.

2 It has these projecting supports, which are part
3 of Claim 1 and were a very important part of Claim 1. And
4 these points of the valve are attached on those points. No
5 dispute about that.

6 This device operates by bending.

7 These commissural points bend and flex. That's
8 the whole point. If they didn't, the valve would tear off.
9 Everybody admits that. Dr. Buller admits it. It's clear
10 from the patent disclosure.

11 These points bend and flex.

12 This is a completely different solution to the
13 problem of building a replacement valve than this.

14 This was the CoreValve solution to the problem.

15 As you can see, it's a completely different
16 structure. First of all, it has two points of contact with
17 this area. It has contact here in the annulus and it has
18 contact above.

19 You heard many witnesses tell you, it was
20 designed to be conical on the bottom, in other words, to
21 have something that's flared out, so that it was anchored in
22 the annulus, so the blood would flow up the ventricle in a
23 smooth way. And it's an inverse cone on the top. It is a
24 cone on the top so that it can align the device and so that
25 it's anchored both here and here, so it wouldn't move.

1 Remember all the concern about migration,
2 alignment, and anchoring.

3 The way this device is set up, you have got the
4 cone down here, a cone up here, and they come to this waist.
5 And the waist is a fixed waist. It opens to a fixed size,
6 so the valve is protected, and so that the device keeps the
7 valve away from the coronary arteries.

8 And there is nothing connected -- these points
9 are connected at a 30-degree angle. That's where they are
10 connected to the device. And there is a specific design
11 function for that. You saw Dr. Pinchuk talk about it. You
12 saw Dr. Rothman talk about it. It's designed to be a fixed,
13 rigid connection, and a 30-degree angle, so it would not
14 tear, it won't break. And it's not intended to bend or
15 flex.

16 Now, as to these differences in design, there
17 really is no dispute. Not even Dr. Buller disputes that
18 that is how the device was designed and how the device was
19 built. And my fundamental point, our fundamental point is,
20 these differences, measured against the claims of Figure 1,
21 can only lead to one conclusion: This device does not
22 infringe Claim 1 of the Andersen patent.

23 Let's go to our next slide and start working
24 through the evidence.

25 One point. I just want to remind everybody that

1 infringement means all elements are present either literally
2 or under the doctrine of equivalents. There has to be, all
3 of the elements of Andersen Claim 1 have to be found in the
4 CoreValve device one way or the other if there is. If there
5 is an element missing, there is no infringement. So you are
6 looking at this on an element-by-element basis.

7 Next slide, please.

8 All right. What are the three missing
9 requirements? This is the focus of your work, when we
10 finish in this courtroom. No projecting supports, not
11 generally parallel, not cylindrical. Those are all
12 requirements of Claim 1 that this device does not meet. And
13 there is no equivalence. And we will talk about equivalence
14 separately.

15 Let's get into the patent.

16 There you have Claim 1. There are a number of
17 elements, 12 elements. These are the three we are focusing
18 on: commissural supports projecting from one side; supports
19 projecting in a direction generally parallel; and
20 cylindrical support means.

21 Let's go to the next one. This is Judge Sleet's
22 claim construction, which you have.

23 You apply that claim construction in determining
24 whether these elements are found in the CoreValve device.

25 I would say this is a good place to start,

1 because this sort of defines one of the key limitations in
2 this patent.

3 Now, it isn't by accident, by the way, that the
4 patent requires something that is projecting from the side.
5 This was considered an important thing.

6 Dr. Andersen testified by videotape:

7 And did you settle on the stent of Figure 1 as
8 the best?

9 That Figure 1, with the projections coming up
10 the top.

11 Yeah, after ten, 15, 20 trials, we said, okay,
12 now we don't want to do more developing work for that part.

13 So they found that that Figure 1 embodiment --
14 let's go back one, if we could -- that Figure 1 embodiment
15 was the best. That's what they determined was the best.

16 Let's go forward. They also testified that they
17 tested a device without those. Dr. Andersen said, how were
18 they different than Figure 2? Figure 2 is Figure 1 with the
19 valve inside. You have seen the same shape over and over.
20 When we started to build valves, we only had one row.

21 One row? That was the question.

22 Yes.

23 And none of the high ones, none of the tall
24 ones, no high ones, they were all the same height?

25 Yeah.

1 And didn't you implant any of those in pigs?

2 No, they didn't work.

3 They didn't work.

4 Next slide, please.

5 I didn't call it a tower. That's what Dr.

6 Anderson called it.

7 What do you call these tall loops?

8 We call them a tower.

9 And that's what he drew. You saw him draw on
10 that on the video testimony yesterday. They call them
11 towers.

12 And they pointed out, and Dr. Buller confirms
13 they pointed out, that these things are an important part of
14 the invention.

15 Next slide, please.

16 Didn't Dr. Andersen and his co-inventors -- this
17 was testimony given by Dr. Buller from the stand -- actually
18 point out in the patent that it was an advantage to have
19 some tall loops above a row of lower loops?

20 Yes, it's an advantage to have a combination of
21 shorter and taller loops.

22 He wanted a structure which was asymmetrical.

23 So it must have must have some taller structures
24 and some shorter structures?

25 Must have taller structures and shorter

1 structures.

2 He is talking about those projecting supports.

3 Next slide.

4 The patent itself.

5 By the way, most of the designations are bigger.

6 PTX-2 just means the exhibit number. So if you want to know
7 what exhibit I am talking about, on most of them I have got
8 it much bigger so you can take it down. This is the patent,
9 which says, The patent inventors, by using a substantially
10 cylindrical thread structure with projecting apices -- that
11 is not my word -- that is the patent's word -- projecting
12 apices, a reduction in weight is obtained.

13 You can see the blue lines show no metal in
14 between those projecting apices, no metal there. The whole
15 idea of that was to be lighter and reduce the weight of the
16 device overall.

17 Mr. Michiels.

18 This feature, these taller devices, these
19 projecting commissural supports were added to the patent
20 during the prosecution. The original claim that was
21 submitted by the inventors didn't include it.

22 The next slide shows they actually amended it to
23 make sure that the final Claim 1 that you have and that we
24 are basing our deliberations on today had a plurality of
25 commissural supports projecting from one side of the

1 cylindrical support means in the direction generally
2 parallel.

3 Our point is that there are no projecting
4 commissural supports anywhere in this device. As you can
5 see, there is nothing projecting from the top. Nothing
6 projecting from the bottom. There is nothing projecting
7 from the side of anything, because it's an integrated frame.
8 All of the frame supports all of the valve. Unlike in
9 Andersen, where the points of the valve are supported on
10 these tall separate stand-alone towers. All of the valve is
11 supported within the integrated frame.

12 If I could have the next slide.

13 Dr. Buller agrees with our fundamental premise
14 that this is an integrated structure where all of the frame
15 supports the valve. He admitted, on cross-examination:

16 The entire frame is an integrated frame which
17 supports the valve as a whole?

18 That's correct, he said.

19 I asked him the next question:

20 So all of the cells in this device, all of the
21 cells, are useful in supporting commissural points. That's
22 what you are telling us?

23 All of them are useful, yes.

24 Next slide.

25 Now, haven't you testified that every cell in

1 the frame is necessary to provide the support?

2 Every cell. Not just the ones that he drew on
3 his pad. It's an integrated structure and all of it is
4 important. There is no part that I could cut out and then
5 use the device. It's an integrated structure.

6 Our point is, no matter how many times you look
7 at that device, or look at this device, there is nothing
8 like the projecting towers in the Andersen patent. And
9 those are required in order to meet Claim 1.

10 Dr. Pinchuk said the same thing. He had
11 evaluated this.

12 By the way, Edwards didn't even call an
13 engineer. Dr. Buller is not an engineer. The only engineer
14 that testified in this trial was Dr. Pinchuk. He is the
15 only one with engineering training. And his conclusion was,
16 there are no projections, nothing sticking out of the side.
17 This is an integrated structure, much like a honeycomb,
18 where all of the cells are necessary to hold the structure
19 together.

20 We all know what projections are. I can hold my
21 hands up over my head. We know that projections are things
22 that stick out from the side, just like the claim says,
23 commissural supports projecting from the side.

24 The goalpost projects, the soccer goal, the net
25 is supported within the frame itself. I think even Mr.

1 Nathan understands what projecting means. In his opening
2 statement he said, as the next slide shows, Next are some
3 things sticking up from the cylindrical support means.
4 Sticking up. We all know what sticking up means. It
5 doesn't mean part of an integrated, solid structure.

6 Now, this was Dr. Buller's analysis. And,
7 frankly, this is the only evidence you have in the case that
8 is contrary to the undisputed evidence of how the CoreValve
9 device is structured and how it functions and how it works.
10 The only evidence is this evaluation.

11 This evaluation is not based on any evaluation
12 of the functions, or how this device operates. Dr. Buller
13 drew a line at the bottom and said, this is what I call a
14 cylindrical support means, even though, by the way, as you
15 know from Dr. Rothman's testimony, what's down here at the
16 bottom is not even the valve. That's the skirt. That's the
17 skirt underneath the valve that makes sure that blood can't
18 leak through the device and down into the ventricle.

19 So even under his analysis.

20 Beyond that, he admits that every single cell,
21 not only the ones drawn in green by him, but this one and
22 this one and this one and this one and this one, are all
23 necessary to support the points of the valve.

24 Let's look at the next slide.

25 He admitted that if you took his figures and

1 took out the metal that he has outlined in green, it would
2 fail.

3 If we were to take the figure you drew and take
4 out the metal between the green lines right down the valve,
5 the device would fail. Right?

6 I don't believe anyone has ever done it. Of
7 course, not. But, yes, I would expect it to. It needs all
8 of the structure in order to function.

9 It's designed in this way.

10 So he is admitting that what he has drawn is not
11 something that is based on how this device operates or how
12 the structure works together. He is drawing green lines on
13 an integrated structure, and called out separate cells that
14 don't perform the function any better than the cell right
15 next to it or the cell two over or the cell above or the
16 cell below.

17 Why do you know that? Well, you know that
18 because here is the frame. When you look at the Andersen
19 device, you know right away what supports the commissural
20 points. They are sticking up from the top. It's those tall
21 projecting towers.

22 You can't see any projections in here, because
23 any one of the cells of this frame would be just as good as
24 any other for supporting the valve.

25 It's an integrated structure. Any single cell

1 in here -- and Dr. Buller admitted that. He couldn't tell
2 where the commissural points are attached in this until you
3 put them in. That's completely different from the way
4 Andersen Claim 1 is set up, where they project up from the
5 side, which the inventors said was a very important feature.

6 So this becomes sort of a courtroom game for
7 someone like Dr. Buller. If you are not going to be limited
8 to the way in which the device actually works, you can just
9 turn any shape into another shape in this fashion.

10 Let's suppose that my patent requires that there
11 be a plurality of triangles. That's a fancy way of saying
12 more than one triangle.

13 Well, there is my square. All right. If the
14 patent calls for a plurality of triangles, most people would
15 say, that's a square. I am fine. I am not infringing.

16 Of course, I can get up here just like Dr.
17 Buller did, and I can draw in the square, I have a triangle
18 there and a triangle there, all of a sudden, I have got a
19 plurality of triangles on a square device.

20 That is not an infringement analysis. That is
21 not evidence upon which an infringement verdict can be
22 based.

23 That is a courtroom game intended to merely meet
24 the elements of the claim without really analyzing what's
25 going on in the device.

1 Let's go on to the next slide, if we could.

2 We can skip forward.

3 So our fundamental point on projections and
4 supports that project is that Anderson requires them, as you
5 can see in Figure 1, and as you will see when you read the
6 claims of the elements of the claim, and that the CoreValve
7 device does not have them.

8 Element 2, generally parallel. Another big
9 issue where there is a fundamental difference between how
10 these devices work.

11 Let me step up and point out Andersen here again
12 for a moment.

13 In the Andersen device, these supports are
14 generally parallel to the axis. They stick up, they project
15 up above the frame, they are generally parallel. And as we
16 will see in a few moments, they bend.

17 But for the time being, we are going to be
18 focusing on the direction in which they are placed.

19 If we could have the next slide, please.

20 Again, you have heard the Court's claim
21 construction, to meet this element, which is in red, you
22 have to have commissural supports that not only project from
23 the side, but they have to be generally parallel to the
24 longitudinal axis. As you can see in Andersen, they are not
25 just generally parallel. They are parallel.

1 These are parallel to the base.

2 Now, you know, from the design history, that
3 CoreValve intentionally tried to get away from this type of
4 structure. They designed something that would be stronger
5 and more durable and would support the valve more safely,
6 because of all of the back-slam and the pounding that you
7 heard Dr. Pinchuk talk about, the basketball, and so on and
8 so forth. This happens to be from Dr. Michiels' notebook.
9 No posts, use the frame zig durability. The whole idea was
10 to move the tabs of the valve up the sides of the frame, so
11 that they would be anchored more safely and securely.

12 Next slide, please.

13 You've seen this. This is DTX-303. You have
14 this in your notebooks.

15 These are the design specifications to which the
16 CoreValve device was built. Mr. Michiels testified about
17 this; and Mr. Nguyen, Than Nguyen was testifying about it as
18 well.

19 You know from seeing it that this 64 degree
20 angle means 32 this way and 32 this way. There is no
21 dispute that this edge of the device is at a 32 degree
22 angle. So the only really question is, where is the point
23 of the commissure? Where is the commissural point attached?

24 Dr. Buller tried to tell you that it was
25 attached close down to the middle. He wanted to drive the

1 point of attachment down as far as he could right down into
2 the base.

3 But you saw yesterday with Dr. Rothman, it's not
4 there. That was the point of passing out the real valve
5 with the porcine tissue, to point out where exactly those
6 leaflets meet. Because the commissural point is nothing
7 more than the place where the leaflets join. And as
8 Dr. Rothman showed you, they do not join where Dr. Buller
9 drew them. They join further up to the point of the tab.

10 And if they're further up to the point of the
11 tab, as Dr. Buller testified -- let's look at our next
12 slide -- they're clearly at a 30 degree angle.

13 I think that Dr. Buller admitted during his
14 testimony that in some of the CoreValve devices that these
15 are clearly anchored there, attached at a 30 degree angle.

16 Well, you know, just from common sense, that a
17 30 degree angle is not generally parallel to anything, as we
18 see here. Parallel lines or generally parallel lines, as we
19 know from geometry, typically don't meet. A 30 degree angle
20 meets within the valve itself, as you can see there.

21 And this was done again for a reason. I think
22 both Dr. Pinchuk and possibly Dr. Rothman indicated that a
23 device is stronger and will support an attachment more
24 strongly if you are leaning back, like you do in a tug of
25 war. As we will see in a moment, Dr. Pinchuk gave another

1 example of the hammocks.

2 But this was not something that was random.

3 It's part of the design of the device. It's something that
4 they intended to create for the purpose of making a better,
5 safer, more durable valve, not generally parallel.

6 Also, not cylindrical. Remember, in the opening
7 statement, I said, on the point of cylindricality, I leave
8 that to you at jurors. People know what a cylinder is.
9 People know what cylindrical is. And as the Court has
10 defined this term, it has to either be the shape of a
11 cylinder or something that is related to the shape of a
12 cylinder.

13 Now, you know from all the testimony that it was
14 the design intention at CoreValve not to have a cylindrical
15 shape.

16 If I could approach this again?

17 Mr. Michiels testified, Dr. Seguin testified,
18 Mr. Bortlien testified, Than Nguyen testified.

19 This is intended here to be conical, not
20 cylindrical, because a cylinder can slide up and down. A
21 cylinder can slide up and down.

22 They did not want to have a cylinder. Why?
23 Because they wanted to have something that would anchor this
24 at the bottom. And as Dr. Rothman testified yesterday, it
25 would help direct the blood flow immediately through the

1 center, because this conical shape at the bottom was a
2 better fit with the ventricle.

3 And they wanted a conical shape at the top.
4 Because, again, a cylinder doesn't make any sense here. It
5 could slide right out. It could slide right out.

6 So a conical top, an upside down cone, is what
7 they designed that came to a waist. And that waist is an
8 important part of this analysis, too. Because the waist
9 is a critical element in protecting the valve from
10 overexpanding and making sure that the frame and the valve
11 don't block the coronary arteries.

12 And there is a ton of evidence that proves that
13 the intention at CoreValve was to go away from a cylinder,
14 not towards the cylinder.

15 So here we see on the left, Figure 1, the '552,
16 and we have the CoreValve device on the right and the claim
17 construction is, not the shape of a cylinder and not related
18 to a cylinder. And as Dr. Rothman testified and virtually
19 every percipient witness, CoreValve did not want to be
20 cylindrical.

21 Let's look at the next slide. Can we just run
22 this?

23 And the point is, the bottom is a cone, the top
24 is a cone, and you have a waist in the middle. And this was
25 something that the inventors actually set out to accomplish,

1 as our next slide will show.

2 This was Than Nguyen. He was asked in the
3 testimony that you observed:

4 "Question: In what way did you deviate?

5 "Answer: I make it a complete conical part to
6 the lower part of the frame -- that's the bottom -- and I
7 make an upward conical part on the top of the frame that is
8 blend with another cone on the top of it.

9 "So actually it's a three cone conical part that
10 is blended by fillet -- I mean blended radiuses."

11 And this was the intention from the very
12 beginning.

13 The next slide shows minutes from the meeting
14 way back in August 2004, before anybody starting talking
15 about infringement, or the Andersen patent, or anything
16 else. Mr. Bortlien testified about this. A meeting in
17 Paris in August of 2004, when they met around the time that
18 Mr. Michiels became the COO, where they met to decide where
19 they were going to move and what needed to be done with the
20 device. And Than Nguyen said in the very first meeting, we
21 need to make it conical to avoid stretching the valve upon
22 mounting.

23 The conical device is what they intended to get,
24 and a conical structure is what they ended up at the end of
25 the day.

1 Next slide, please.

2 Okay. No equivalence. Now, you heard His Honor
3 read an instruction on equivalence. Equivalence is the
4 exception, not the rule. Equivalence applies if someone is
5 just barely missing, someone who would otherwise be
6 infringing but barely missing. It's intended to catch
7 people who are just trying to step a tad outside the claim,
8 not somebody like CoreValve for whom the whole device is
9 fundamentally different.

10 I mean it is undisputed overall that this device
11 looks, is shaped, is structured in a totally different
12 fashion than anything that is disclosed in the Andersen
13 patent in Claim 1. So equivalence does not apply in a case
14 where you have these fundamental differences between
15 devices.

16 So here is an example. One measure of
17 equivalence, one way to evaluate it is does it perform
18 substantially the same function in substantially the same
19 way to get substantially the same result?

20 So, for example, with respect to projecting
21 commissural points, you have to ask, does the CoreValve
22 device do what Claim 1 does in the same way, or
23 substantially the same way, and get substantially the same
24 result?

25 Both of these devices can connect two pieces of

1 wood but they're not equivalent because one operates in a
2 fundamentally different way. A screw operates in a
3 fundamentally different way from a nail and gets a different
4 result, so those two are not equivalent.

5 Next slide, please.

6 All right. One of the key points on this issue
7 is, and you heard this a number of times, the Andersen Claim
8 1, the Andersen invention, the way he tried to solve this
9 problem was based on the old surgical valves, based on
10 having commissural points that project up above the base and
11 that flex and bend. That flex and bend when they operate.

12 Why do they flex and bend?

13 Let's run this if we can, Mr. Hugo.

14 They flex and bend so that the valve won't be
15 torn off these tall towers.

16 The Hancock patent on the right, you see the
17 Claim 1 embodiment on the left. These towers, you see this
18 on the left and right. They are bending in as the valve
19 closes and the back slam comes so that they don't sheer off.

20 That's what Dr. Pinchuk was talking about in
21 terms of having a device that manages the stress and manages
22 that weight by flexing as these do.

23 Next slide, please.

24 Now, Dr. Buller is on board with this. Even he
25 concedes that the Andersen Claim 1 device is intended to

1 flex.

2 "Question: You have testified the device was
3 designed so that the tall posts actually moved during the
4 operation?

5 "Answer: They will have some elasticity and be
6 capable of moving so when the heart beats, they can bend in
7 slightly.

8 "Question: And you have actually likened that
9 to a diving board that moves in and out; right?

10 "Answer: Yes. Anything that is flexible. The
11 analogy is to lots of things. A diving board is a good one,
12 that can bend and then will return. It's elastic."

13 Let's go back to the last slide, Mr. Hugo.

14 He is talking about the bending. If we could
15 run it.

16 He is talking about the bending of the
17 commissural supports that have to bend when the back slam
18 comes so the valve won't be torn off. That is what he is
19 talking about.

20 All right. Now, you know, again, from the
21 design history, from the testimony of Mr. Bortlien, the
22 testimony of Than Nguyen, the testimony of Rob Michiels,
23 CoreValve intentionally designed their device so that it
24 would not flex. They wanted a device made of nitinol, it
25 was self-expanding, that doesn't have parts that move.

1 Now, is the point that there is absolutely no
2 movement whatsoever? No. I mean any device operating in
3 your body under these conditions will show some small amount
4 of movement. Our point is we don't have a support system
5 for the valve that is intended to bend or flex in, and our
6 system, the CoreValve system does not do so.

7 On the left, you see Andersen with the arrows
8 showing the bending we saw in the video. On the right, we
9 see CoreValve with a rigid frame.

10 Again, if I could approach this board.

11 There is nothing in this frame that is intended
12 to flex or bend in. It's intended to be fixed once it gets
13 in your body. Why? You heard from Dr. Rothman and I think
14 Dr. Pinchuk, both, nitinol doesn't do well when it is
15 flexed. Nitinol, over time, can break if you are flexing it.

16 So the idea was let's move these points up to
17 30 degrees. Let's put them on the edge of the device here.
18 Let's anchor them within a cell up there, and that way
19 they'll be safe, they won't tear, they won't break, and we
20 don't have to have a system like Andersen's where they have
21 to bend, they have to flex in order to function properly.

22 Let's look at the next slide, please.

23 Okay. This was Dr. Pinchuk's effort to explain
24 this. You see on the left you have something like on the
25 top, something like Andersen where we have projecting posts

1 and a hammock supporting it.

2 What he testified was that in this system,
3 because the point of attachment is up on a tall tower, it
4 has to flex. It has to bend when you put weight on it or
5 the valve will tear off.

6 Whereas, if you put this point of attachment on
7 an angle structure, an angle support, the stress from here
8 is spread all the way down the post and all the way across.

9 So the stress here is pushing down this side.
10 The stress here is pushing down this side. So when that
11 back slam comes, it's not being absorbed by the points of
12 the valve themselves or not requiring you to flex.

13 You don't have to flex. You can stay in a rigid
14 frame, which is what CoreValve has, and not tear.

15 We're showing you here inside the device.
16 Andersen flexing and CoreValve with a firm point of
17 attachment at 30 degrees.

18 Now, you saw for yourself the evidence that we
19 presented. These are two separate tests. They're DTX-1313
20 and 1314. They'll be in the juryroom with you. They were
21 tests intended to show the valve under normal operation. I
22 want to stress that again. These tests show the valve under
23 normal operation.

24 And what do they show? They show no detectable
25 motion of the frame. No detectable motion of the frame.

1 Why is that significant? The frame doesn't
2 move. The commissural supports, the upper end of this frame
3 to which the commissural points are attached, are rigid,
4 firm. They don't move. This is what the FDA requires.
5 This is what the FDA shows.

6 Now, as Dr. Rothman testified yesterday, what
7 Edwards presented was a fracture test where they're putting
8 the kind of back slam on the device that no human body could
9 have generated. If you did, you would be at a stroke
10 condition or near heart attack.

11 The tests that you saw were destructive tests
12 intended to determine when nitinol would actually fracture
13 and break, not a test like these intended to show normal
14 operation.

15 Dr. Rothman added another point of evidence
16 yesterday, which is that he has actually seen these in a
17 human body because he has performed this type of operation,
18 this type of procedure.

19 And he said, because it's an integrated unit and
20 the load is shared across. There is no effective movement
21 of this device inside the body. I have seen this on
22 angiograms. The device does not move at all.

23 So our point is whether you analyze this
24 under literal infringement where every element has to be
25 there exactly or whether you analyze, which you will,

1 under the doctrine of equivalents, the CoreValve device is
2 fundamentally different, does not meet the projected
3 commissural support element, the supports generally
4 parallel, or the cylindrical element and, therefore, it
5 doesn't infringe.

6 Now, if you were to find any one of the elements
7 missing, that is enough. It is required for the plaintiff
8 to show that every element is present either literally or in
9 equivalent form. And if they fail to do that, the verdict
10 must be for CoreValve.

11 Next slide, please.

12 Let's go on to the next one. Well, let's move
13 past that one.

14 Okay. Now, I want to talk for a minute about
15 the history of these inventions only for the point that
16 CoreValve did this independently. And I'll let you evaluate
17 the credibility of Dr. Seguin and Mr. Bortlien and
18 Mr. Michiels and Than Nguyen, but I will say that we didn't
19 hold back anything. CoreValve doesn't have anything to
20 hide.

21 You not only saw all the inventors but you saw
22 prototypes. You saw the design sheets which are in your
23 tabs. You saw Mr. Michiels' lab notebook. You even saw
24 the two prototypes that Dr. Seguin brought in here. And as
25 I mentioned, there isn't a scrap of evidence that any of

1 that material was copied from anybody else. That was all
2 independent work, original work that ultimately led to a
3 patent.

4 And they want to say, well, wait a minute.
5 Dr. Seguin was in the wilderness. He saw the patent. Oh,
6 all of a sudden, he had a product.

7 Now, you know that is not true. You know it
8 took years to make this thing work and it took a lot of hard
9 work and a lot of trial and error.

10 He was an inventor going in. Dr. Seguin has
11 five patents of his own even beyond CoreValve, so he was no
12 stranger to difficulty, no stranger to inventing things. He
13 had done a lot of that.

14 As the next slide shows, we took Mr. Bortlien
15 and Dr. Seguin and Mr. Michiels through this whole time
16 line. And you know that in a trial of this length, where
17 we're operating on the clock, we don't have time to show
18 every single prototype.

19 I've got 15 pages of prototypes in my hand with
20 15 to 20 prototypes per page that the CoreValve inventors
21 worked on. And as you heard from Mr. Bortlien, a lot of
22 them didn't work. This one didn't work. That one didn't
23 work. They tried a lot of different things.

24 If this were just a copy from Andersen, why did
25 it take four years and a lot of engineers and more than 100

1 prototypes to get a device that actually worked?

2 So I'm going to let the evidence speak for
3 itself for just a minute.

4 Mr. Hugo, if you could just run the next slide.

5 These are some of the prototypes that you saw,
6 and some of the prototypes that were in the notebook.

7 The point of this is that CoreValve put in
8 independent work, original work, difficult work over a four
9 year period before they actually came up with something that
10 could be implanted in a human, which did not happen, as you
11 heard from Dr. Seguin, until 2004.

12 Now, in addition to that, in addition to that,
13 CoreValve has at least two patents. You saw the '682 and
14 the '406.

15 If we could go to the next slide, please, Mr.
16 Hugo.

17 These were awarded to Dr. Seguin and Mr.
18 Bortlien.

19 Let me back up just one minute.

20 You also saw, not every step -- although I think
21 Mr. Michiels tried to give you every step -- but many steps
22 along the way of the development itself.

23 We actually showed you the design notebooks and
24 what they were trying to accomplish and why that was
25 important.

1 We reviewed this one with you.

2 These were inventors trying to solve the problem
3 on their own, without reference to anything else. And every
4 single page of this confirms what we said, that this device
5 was designed to be different and designed to be better, and
6 designed from scratch by the group that you heard testify
7 here in the courtroom.

8 Next slide, please.

9 We brought all four. These are the four people
10 most responsible for the design of the CoreValve device.
11 And they were all here. Mr. Nguyen was unable to travel
12 here, so he was presented by videotape.

13 Okay. This is the '406 patent, which you heard
14 Dr. Rothman testify about yesterday. It actually covers the
15 CoreValve device.

16 If we could have the next slide.

17 This is the '682, which I think Mr. Michiels
18 testified about and Dr. Seguin as well. You can see the
19 shape of Figure 1. Not exactly like what we ended up with,
20 but it certainly has all the same concepts of a conical
21 base, a wider top, to fit the upper annulus, a waist is
22 fixed in the middle. It has all the basic features of what
23 eventually became the Generation 3 CoreValve device.

24 How were these patents obtained?

25 They were obtained openly, through an

1 application in the Patent Office, in which Dr. Andersen's
2 patents -- and there were more than one of them -- were
3 disclosed. Here is the '552, that is the issue in this
4 case -- the '081 and the '614, all disclosed, and not just
5 on a sheet of paper.

6 The application for the '406 actually discussed
7 Andersen. This is the application. You have heard a lot
8 about the file history and so on and so forth. The
9 inventors submit an application. They told the Patent
10 Office, more recently, '552, that is the patent at issue
11 here, illustrates the technique of this type.

12 In other words, there is someone else in this
13 area that's operating.

14 But the stent-supported systems designed for
15 positioning of a heart valve introduce uncertainties of
16 varying degree with regard to minimizing migration from the
17 target valve site.

18 They are saying, '552 isn't perfect. There are
19 problems. Stents of this kind can migrate and cause trouble
20 for patients.

21 So our invention aims to remedy these
22 significant problems. This invention is different. We are
23 setting out to solve these problems.

24 And they did. They did solve the problems.

25 They not only were awarded patents, but they

1 made a product which, as you know, has been successful all
2 around the world.

3 Next slide, please.

4 Now, the claim that somehow -- again, with no
5 evidence whatsoever that anybody was copying Andersen, they
6 stood up a couple of times in opening and closing and
7 suggested that there was something suspicious going on.
8 Take a look at DTX-1277.

9 I mean, Mr. Bortlien testified that everybody
10 was aware of the Andersen patent. And they actually made a
11 conscious effort to make sure they weren't using it.

12 CoreValve respects patents. CoreValve has its
13 own patents. So CoreValve has respect for the patent system
14 in general.

15 And here is Mr. Bortlien testifying that he did
16 a study to see if they could make sure that the device they
17 were developing did not infringe the '552. He says, The
18 stent cannot have higher commissural supports, higher
19 commissural supports.

20 So they did a study in which they built the
21 device with no projections, no projecting supports, and
22 found, it's fine, it works. And ultimately they built a
23 device, which is there to your right, in which there are no
24 higher projecting points.

25 And then who would have thought, after all of

1 the disclosure in the Andersen patent about projections,
2 someone would come in and claim that this device, without
3 projections, is infringing?

4 Mr. Bortlien testified, what was the objective
5 of this prototype? This one was made because we didn't want
6 to infringe the '552. So we wanted to see if we could
7 attach the valve inside a stent that didn't have these
8 projections. We didn't want to infringe the '552.

9 Dr. Seguin told investors, as you heard during
10 his examination, when analysts asked, are you infringing --
11 let's go back -- There are a number of elements which have
12 led our patent attorneys and the patent attorneys of VCs to
13 conclude that the way we are building our IP portfolio does
14 not infringe on the Andersen patents today.

15 So the idea that somehow poor little old Edwards
16 is being ignored or we are not responding or we are running
17 around taking, copying things, is nuts, based on this
18 evidence.

19 Now, remember, also, I don't know how many times
20 we have seen the letter that they sent:

21 We would like to know your explanation.

22 Dr. Seguin was meeting with the CEO of this
23 company, Mr. Wood's boss, every two to three months. And he
24 testified that every two to three months he sat down with
25 Mike Mussallen, who is the CEO of Edwards, and discussed a

1 whole range of subjects: How are we going to compete in the
2 market? What is the best way to approach patients? Let's
3 make sure everybody's devices are safe. Let's make sure
4 that we are training. And Dr. Seguin testified, sure,
5 Mussallen told me repeatedly we infringe, and I repeatedly
6 told him we do not infringe your patent.

7 And they went ahead and sued anyway. And he had
8 a belief that was true, that was proven in this courtroom
9 was right.

10 Okay. The other point on this issue of
11 independent development is, if we are all just copies of
12 Andersen, why are these devices so different? Why is the
13 CoreValve device 18 French, repositionable, able to fit
14 easily into a femoral artery, more forgiving, I think is
15 what Dr. Manoharan said, than SAPIEN, why would that be so,
16 if all we are doing is copying off the same basic design?

17 It's not. Neither company is using Andersen.
18 SAPIEN doesn't use Andersen, either, as we will see in a
19 moment.

20 Certainly, CoreValve doesn't.

21 Okay. The result has been success. Patients
22 treated around the world using CoreValve, as Dr. Manoharan
23 indicated.

24 Let's go to the next slide.

25 I want to make two points about quality of

1 evidence.

2 You have heard a lot of stuff from Edwards in
3 this trial that has nothing to do with what they are
4 expected to prove. Nothing whatsoever to do. They put up
5 this map and suggested there was something sinister about
6 moving to Irvine. Six miles away from Edwards, he said in
7 the opening. Six miles away from Edwards. Okay. You now
8 know, thanks to us, that the reason to go to Irvine is there
9 are hundreds of companies in Irvine building these products.
10 So lots of engineers, lots of resources, lots of test
11 facilities. That is absolute baloney. And they tried to
12 make that some part of a conspiracy in opening, and they
13 persisted throughout the trial.

14 Next slide.

15 How about this one?

16 Oh, you have gone in and stolen employees. Wow,
17 all these people are from Edwards. Than is from Edwards.
18 Stan is from Edwards. KT is from Edwards. Rob is from
19 Edwards.

20 They didn't even tell you, until we told you,
21 that these people were all long gone from Edwards before
22 they signed on with CoreValve. They signed on with
23 CoreValve in 2004. KT left in the '92. Michiels in '89.
24 Komatsu in '93. Nguyen in '96.

25 Come on. You have an instruction now from Judge

1 Sleet that says -- this is all a sideshow anyway. There is
2 no claim that anybody that CoreValve hired, there was
3 anything wrong with it or that they acted improperly in
4 hiring former Edwards employees, former Edwards employees.
5 2.2.

6 My point there is, if you had real evidence of
7 infringement and you had a strong infringement case, not
8 just Dr. Buller drawing on a piece of paper, you wouldn't
9 need to vilify people and try to turn Dr. Seguin and
10 Bortlien into criminals and claim that they were out with
11 some nefarious plan, some exit strategy, as though that is
12 wrong or somehow inappropriate. That is all a bunch of
13 nonsense.

14 What did they do? They stood up and said, wow.
15 This Andersen patent is the greatest thing since sliced
16 bread. Everybody in the world is out to have this thing.
17 It is a wonderful device. They didn't bring any of the
18 people that made the decisions on the Andersen patent. They
19 brought Mr. Wood, who is a perfectly good witness for
20 Edwards. But how about the guys that were actually
21 involved? Mr. Wood didn't have anything to do with
22 Andersen.

23 THE COURT: Ten minutes, Mr. Van Nest.

24 MR. VAN NEST: Thank you.

25 Let's go back. Mr. Rowe -- we brought Mr. Rowe

1 in by video. He is an Edwards employee. We can't compel
2 him to come. We brought Dr. Cribier in. He is a consultant
3 for Edwards. We can't force him to come. Mr. Benichou, who
4 designed the SAPIEN, we brought him.

5 Dr. Knudsen, Dr. Andersen, they didn't come,
6 either, even though they are the No. 1 and No. 2 inventors
7 on this patent, they never set foot in the courtroom. We
8 are the ones that brought you the whole story, not just part
9 of the story.

10 Last topic -- let me just mention burden of
11 proof.

12 On everything I have been talking about, they
13 have got the burden of proof.

14 If the evidence is inconclusive on infringement,
15 or willfulness, if the evidence isn't there, if you can't
16 make your minds up, they have the burden of proving that, as
17 Judge Sleet has instructed. They have got to bring it. And
18 as I mentioned, they didn't bring it. We are the ones that
19 proved that CoreValve is different and doesn't meet these
20 claim limitations.

21 Okay. Last topic, very briefly. Enablement.
22 What is the point of enablement?

23 We have never contended that the Andersen patent
24 didn't have good ideas in it. That's what is reflected in
25 all the witnesses' testimony and the articles. It's a great

1 idea. It's a very good idea. We don't want to take
2 anything away from the Andersen inventors.

3 As I said in opening, we don't need to have you
4 reach enablement in order for us to prevail, because our
5 device doesn't infringe.

6 So our primary point in this trial, and the
7 evidence that we focused our attention on, is
8 noninfringement.

9 But we are in this market for keeps. CoreValve
10 is the leader. They want to stay the leader. Edwards now
11 has the Andersen patent. The inventors don't have it
12 anymore. And it's clear that they are going to keep
13 asserting it against a product that is ahead of them in the
14 market.

15 So our request to you is, we shouldn't have to
16 contend with this patent over and over again in other
17 lawsuits if it's not valid.

18 And you can't have a valid patent if all you
19 have is a good idea.

20 You have got to have more than a good idea. You
21 have got to have something, as the next slide shows DaVinci
22 had a great idea for a flying machine, but you have got to
23 enable someone to make and use it without undue
24 experimentation.

25 That's what the Wright Brothers did. That's why

1 they got a patent. They actually enabled someone to do it.

2 You know, in this case, the following things are
3 undisputed. No one has ever put an Andersen prototype or an
4 Andersen device into a patient. No one has done it.
5 Edwards hasn't done it. Heartport didn't do it. Stanford
6 Surgical didn't do it. The inventors didn't do it. No one
7 has done it.

8 And the patent itself provides little or no
9 guidance how to do it. They did it in pigs, it's true.
10 They got some of these to stay in pigs for a few minutes.

11 But they said, okay, we are using this in pigs,
12 but the cardiac valve prosthesis has a corresponding form.
13 What the heck does that mean? A corresponding form. That
14 is not much guidance.

15 Next slide.

16 And they were the ones that said these aren't
17 really engineering drawings. They are just schematics.
18 They don't really show what you are supposed to do. They
19 are just schematics. They told you that over and over
20 again. And we would quite agree, these are nothing more
21 than schematics.

22 The inventors acknowledged that they couldn't
23 get this thing to stay in even an animal for more than a few
24 hours. And they acknowledged that. And Dr. Hasenkam is a
25 wonderful guy. He was a good witness. He had a good idea.

1 But he couldn't get it to work, either.

2 Now let's bring the people that they should have
3 brought and that we brought to explain what's really going
4 on with this patent.

5 Dr. Cribier, in his patent, which is DTX-10,
6 says, too weak to be forcefully imbedded, high risk of
7 regurgitation, impossible to use in clinical practice. You
8 can read that yourselves in Column 3 of the Cribier patent,
9 which covers SAPIEN.

10 Next.

11 This is what Stan Rowe said: Stainless steel
12 wires, these lack sufficient strength. Dimensions specified
13 are much too large. Same thing.

14 This thing is too big. That was the point of my
15 dowel. This is the size of the Andersen device. It is very
16 small. If you could build it, it can't ever go into a
17 femoral artery, and never has.

18 Next slide, that PVT did the test. We brought
19 you those. They didn't bring you those.

20 The test of those protruding apices failed. The
21 stent failed, didn't fulfill its function.

22 Next slide. The conclusion from Rowe was,
23 Andersen, sadly, does not describe a method or design that
24 if constructed is functional over any period.

25 This is their employee. Stan Rowe is the guy

1 that said, I spent all this money. Guess what? He fell in
2 love with the Andersen patent the day he bought it.

3 And as Dr. Buller acknowledged, there are many,
4 many reasons for buying a patent. You can buy a patent to
5 use it, or you can buy a patent to use it in court.

6 Did PVT use the Andersen patent to build their
7 device? Absolutely not. Cribier testified and Benichou
8 testified they didn't use Anderson to build this device.

9 Did you ever try to use a stent that was
10 described by Andersen?

11 Not at all.

12 During this whole process, did you use a wire
13 loop stent as shown in Andersen?

14 No.

15 Next slide.

16 Benichou to the same effect: Are you aware of
17 any technical details you derived from this patent that
18 contributed to the design of any of these stents?

19 There were no technical details that we learned
20 from Andersen or that we learned from the patent in terms of
21 the design.

22 Remember, Mr. Benichou said he didn't even read
23 the Anderson patent as part of his design work.

24 If I could have the Elmo, please.

25 I want to make a point, also, about the verdict

1 form, which is simply this: -- I have never heard one
2 called user friendly, but I think it is. You are going to
3 be asked two questions on Page 1. I think these are really
4 the key questions in the case and maybe the only two you
5 will ever have to decide, because the way the verdict form
6 is set up, if there is any limitation missing from Claim 1,
7 then CoreValve is entitled to a judgment of noninfringement.
8 And if you answer no to Question 1 and if you answer no to
9 Question 2, which is about equivalents, then you skip over
10 virtually everything else. You don't consider willfulness,
11 because if there is no infringement there is no willfulness.
12 You don't consider damages, because if there is no
13 infringement there is no damages.

14 So the key focus of your work in just a few
15 minutes is on Questions 1 and 2. That is infringement.
16 That's what it's all about.

17 It's whether or not this device meets each and
18 every claim limitation, including projecting supports,
19 generally parallel, and cylindrical.

20 That's the focus of it.

21 Obviously, you know what I think about how those
22 deliberations should come out.

23 So you will notice, I have said nothing about
24 damages, and that's because you have a lot of information
25 about that. You have the expert, you are going to have

1 expert summaries from both of the experts on damages. I
2 don't feel a need to comment on that today.

3 I will leave that in your hands if you need to
4 get there.

5 So, again, finally, thank you. We very much
6 appreciate the help and attention you have given us these
7 last couple of weeks.

8 Good luck in your deliberations.

9 Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Van Nest.

11 Mr. Nathan, you have 15 minutes.

12 MR. NATHAN: Thank you, Your Honor.

13 Courtroom game. Courtroom game. This is not a
14 game.

15 Could I have Slide 48 up, please.

16 Edwards spent 400 million dollars to get into
17 this business with SAPIEN, which is covered by Andersen, and
18 CoreValve's conduct has cost Edwards 75 million dollars.

19 This is not a game. This is what really
20 happened, in the real world. 75 million dollars.

21 Now, I left up the magnetic board for two
22 reasons. One, it's too heavy to take down. And secondly, I
23 would like to just have you look at that board and look at
24 what my colleague has put up there for a comparison.

25 He compared the CoreValve device to the Andersen

1 preferred embodiment. That's what he compared it to.

2 As the Judge has instructed you, the comparison
3 has to be between the claim and the CoreValve device, not
4 Figure 1, not Figure 2, which is the preferred embodiment.

5 That's the fundamental error in their entire
6 approach in the case.

7 All of the testimony that was put up, all of
8 the figures that was put up during my colleagues closing
9 remarks, were about the preferred embodiment. You saw
10 Figure 1. You saw Figure 2. How many times have you seen
11 it in this trial? That is not what the scope of the claim
12 is.

13 Now, you remember yesterday, Dr. Rothman? I
14 asked him about the 12 parts.

15 Part 1, and I asked him, is it in there? Yes.

16 Part 2? Yes.

17 Part 3? Yes.

18 Skip 4 for a moment because he disputed that.

19 Part 5? Yes.

20 Part 6? Yes.

21 Part 7? Yes.

22 Part 8? Yes.

23 Part 9 he disputes.

24 Part 10? Yes.

25 Part 11? Yes.

1 Part 12? Yes.

2 It's only 4 and 9. And 4 is the cylindrical
3 support means.

4 Well, my colleagues tells you that this was
5 designed to be a cone. And it was not designed to be -- and
6 I use the word now that he used -- a cylinder.

7 The judge has instructed you that cylindrical
8 doesn't mean cylinder. It's something that has the shape of
9 or relating to a cylinder. It doesn't have to be a perfect
10 cylinder.

11 And, indeed, Dr. Pinchuk has already testified
12 that indeed they have a cylindrical support means.

13 So it comes down to one thing, Part 9. And Part
14 9 is, do the admitted commissural supports project in a
15 direction generally parallel?

16 Now, I had the fork out here. I was hoping
17 counsel would address it. You never heard a word about the
18 fork analogy, about how the entire commissural supports of
19 the CoreValve device projects generally parallel to the
20 axis. Not a word. All you heard was about the position of
21 the neck of the fork where they measure the 30 degrees, and
22 that is critical to our case.

23 He says that the CoreValve device is an
24 integrated structure.

25 Can I have Slide 35?

1 This came up yesterday with Dr. Rothman. I
2 asked him whether or not the preferred embodiment of the
3 Andersen was an integral structure?

4 And we went back and forth and so forth, and
5 ultimately he said:

6 "Question: Now you mentioned earlier with
7 respect to the CoreValve device, the large model, that it's
8 an integral structure?

9 "Answer: Yes.

10 "Question: Is Figure 1, built as the inventors
11 taught to build it for their preferred embodiment, an
12 integral structure?

13 "Answer: Yes."

14 There was nothing magic about CoreValve's
15 integral structure. So was Andersen. That was conceded by
16 Dr. Rothman.

17 We heard about the comparisons between SAPIEN
18 and CoreValve.

19 The final instructions on Page 20 -- and I ask
20 you to take this back into the deliberations room -- made it
21 absolutely clear that the proper comparison is the claim
22 against CoreValve, not SAPIEN against CoreValve.

23 SAPIEN against CoreValve is absolutely
24 irrelevant. The preferred embodiment against CoreValve is
25 irrelevant. The only thing that counts are the 12 parts in

1 CoreValve. They've admitted 10 of them. There is no doubt
2 about the cylindrical support means. Pinchuk, Dr. Pinchuk
3 admitted that. It's down to the 4.

4 Now, I heard and I wrote down these words as
5 best as I could because I'm not a court reporter. I heard
6 bending, flexing, motion, tower, protrusions, projections,
7 posts, projecting apices.

8 We don't have any of those things, says
9 CoreValve.

10 Bending, flexing, motion, tower, protrusions,
11 projections, posts, and projecting apices. Not one of those
12 words are in the claims. Not one. They read them into the
13 claim in order to avoid the claim.

14 They have rewritten the claim in this courtroom.
15 You can't do that. The claim is the way it is. It was born
16 in the Patent Office. It emerged from the Patent Office.
17 That is what you have to deal with.

18 We heard about size, 18 French. Size is not in
19 the claim.

20 We heard about, there was supposed to be nothing
21 between the commissural supports. There is nothing in the
22 claim about you can't have material between the commissural
23 supports.

24 Now, I'd like to ask you, as you reflect on this
25 entire experience, to think about the creditability of the

1 witnesses. I'd like you to think about the nature of their
2 motive and what they had to stand to gain or lose as a
3 result of this.

4 Dr. Seguin. Dr. Seguin will lose money if he
5 loses this case. He is no longer with CoreValve but he has
6 one job, and that is to testify against Edwards.

7 Dr. Rothman used to be independent. He has now
8 been hired by Medtronic, the company that owns CoreValve.

9 Georg Bortlien also has a direct interest in
10 this case. He also will have to pay money back if the case
11 is lost.

12 Dr. Kinrich, their damage expert, relied on a
13 Medtronic employee who didn't come forward and, therefore,
14 whatever numbers he, Dr. Kinrich relied on, were given by a
15 Medtronic employee working for the owners of this company.

16 Now, I'm very glad that counsel picked this up.
17 I don't have it on the computer so if I could have the Elmo.

18 This is the slide that my colleague put up
19 where he mentioned attorneys.

20 I mentioned this in my opening and I just want
21 to point something out to you.

22 What Dr. Seguin told the analysts, told the
23 analysts: What you are addressing is infringement issues.
24 And there are a number of elements which have led our patent
25 attorneys, and the patent attorneys of a number of VC firms,

1 to conclude that these -- the way that we are building our
2 IP portfolio does not infringe on the Andersen patents
3 today.

4 And not one of those patent attorneys came
5 forward and testified, not one of them. Not one of the
6 patent attorneys for the VC companies came forward.

7 Now, think about that, I ask, when you consider
8 whether or not Dr. Seguin, in good faith, proceeded the way
9 he did.

10 Now, with respect to all this independent
11 development, there is one very important thing that is
12 missing here.

13 Dr. Seguin kept no records. We have no idea of
14 what he did except one thing: We know he got the patent.
15 We have no idea how he got to where he was, how he built
16 these prototypes. We have no invoices. We have nothing
17 dated and so on.

18 And so keep in mind that the absence of records
19 demonstrates -- in my submission demonstrates that he had
20 something to hide. It's incredible to think that all these
21 prototypes went on without some vendor invoice, some dates,
22 some checkbook, something to date it. There was absolutely
23 nothing.

24 And I grant that there were lots of prototypes.
25 Counsel pointed them out to you. Again, not to run down the

1 students, but they were done by the students in France.

2 When they got in the hands of professionals,
3 first Admedes in Germany and then Than Nguyen and the others
4 in Irvine, they did it lickity-split. GEN 1 was done in six
5 months, GEN 2 was done in a matter of weeks, that's what
6 Than Nguyen testified in 2005, and GEN 3 was done the
7 following year.

8 So that is something that I would ask you to
9 consider.

10 THE COURT: You have five minutes, Mr. Nathan.

11 MR. NATHAN: I'm on my final slide. I'm going
12 to wind up with extra time.

13 THE COURT: All right.

14 MR. NATHAN: Can I have Slide No. 50, please.

15 As you deliberate, I'd like you to just consider
16 this point.

17 There is no question that from the very
18 beginning, Dr. Seguin's plan was to build a house that he
19 could sell. Where I come from, they call it flipping a
20 house. You buy it, you sell it.

21 That was their exit strategy. You will find the
22 exit strategy right in your juror notebook. I believe it's
23 Tab No. 7.

24 CoreValve is focused on offering an exit to its
25 investors and shareholders through a trade sale.

1 Edwards has a different approach. They sunk
2 \$400 million into this. Edwards' approach was to buy the
3 house and live in it. And they are living in it. They are
4 in it for the long haul. They want to help people like
5 Justin. And that's why they did it, and they've been doing
6 it for 50 years. And I ask you to consider that and take
7 that into account in your deliberations.

8 Thank you, ladies and gentlemen.

9 THE COURT: Thank you, Mr. Nathan.

10 All right. Mr. Van Nest, could I ask you to
11 move the easel and board?

12 MR. VAN NEST: Yes, Your Honor.

13 THE COURT: Will our jury officer come forward,
14 please.

15 Ms. Walker, please swear the jury officer.

16 (Jury officer sworn in charge of the jury.)

17 THE COURT: Ladies and gentlemen, you may now
18 commence your deliberations.

19 (Jury left courtroom.)

20 THE COURT: All right. Let's make sure, just
21 housekeeping. Those who want to sit can sit or leave if you
22 like. Counsel may sit at counsel table.

23 Have we gathered all of the evidence? Are we
24 agreed on it?

25 Okay. Is it already in the back, Ms. Walker?

1 CHIEF DEPUTY CLERK WALKER: No, it's not in the
2 back.

3 THE COURT: Okay. Let's get it on back there.

4 Is it jury going to have need? None of the
5 animations were admitted; right?

6 (Mr. Madies shakes head no.)

7 THE COURT: Mr. Van Nest and Nathan, make sure
8 Ms. Walker knows where she can get you quickly. I guess you
9 will go back to your hotels or wherever you've set up.

10 MR. VAN NEST: We'll be right in the building.

11 THE COURT: Okay.

12 Mr. Nathan.

13 MR. NATHAN: Judge, where would you like us to
14 be? In the building?

15 THE COURT: No, you don't have to be in the
16 building. This jury is going to eat its lunch. Its lunch
17 will be waiting for it. And I expect they will take some
18 time. So, no, you don't need to be planted in the building.
19 I just need to know where Ms. Walker -- she needs to know
20 where she can get you reasonably promptly. I expect the
21 jury to have questions and I'd like the jury not to have to
22 wait too long.

23 All right, counsel. We're recessed.

24 (Recess taken while jury deliberates.)

25 (Back on the record at 1:25 p.m.)

1 THE COURT: Please sit down.

2 So here is the question.

3 Can we have Claim 1, 12 point blue poster?

4 They want that.

5 MR. NATHAN: No objection.

6 MR. VAN NEST: It's not evidence, Your Honor.

7 MR. NATHAN: No objection.

8 THE COURT: It's not evidence. It's a
9 demonstrative. Was it reduced and given to them in their
10 jury books? No?

11 MR. NATHAN: No.

12 MR. VAN NEST: I don't believe so.

13 MR. NATHAN: There is a slide on it. They only
14 saw it in two forms, one on the screen and then that.

15 THE COURT: Is there anything we can direct them
16 to other than the claim that might assist them?

17 MR. VAN NEST: I think the claim, isn't the
18 claim in the juror notebook?

19 MR. NATHAN: No, no. But it's the 12 points.
20 We could -- if you will give us five minutes, we can take
21 the slide with the checkmarks and give them that 12 point
22 break down without the checkmarks.

23 I see Mr. Van Nest giving a negative indication.

24 MR. VAN NEST: That is how an expert chopped up
25 the claim.

1 MR. NATHAN: Well, there is nothing that they
2 have, unless I have forgotten something, judge, that parses.
3 I mean the examination of Rothman was the 12 points. Buller
4 was the 12 points. I don't think there is anything else
5 that parses it.

6 THE COURT: I'm going to just write a note back
7 that the 12 point blue poster is not evidence. That it is a
8 demonstrative exhibit and therefore not evidence. Okay?

9 MR. VAN NEST: All right.

10 MR. NATHAN: There is only one other suggestion
11 I can make. I'm not rearguing. I understand that.

12 If they were focused on one part, would we -- we
13 could find out what the part is, and we can get the
14 language.

15 THE COURT: Well, they're probably focused on 4
16 and 10.

17 MR. NATHAN: 4 and 9.

18 THE COURT: 4 and 9.

19 MR. NATHAN: They just won't see that when they
20 look at the claim is the problem.

21 THE COURT: Well, again, as Mr. Van Nest points
22 out, that is not actually claim language.

23 MR. NATHAN: Oh, it is.

24 THE COURT: Is that?

25 MR. NATHAN: Oh, yes.

1 MR. VAN NEST: Yes.

2 THE COURT: I don't have my glasses on. Yes, of
3 course it is.

4 MR. NATHAN: It's word for word.

5 THE COURT: Yes.

6 I guess what they're telling us is that some
7 formulation of this would help them focus on where the real
8 field of dispute is. And I think the idea should be to do
9 whatever we can do to help the jury with its task, within
10 the confines of the rules.

11 Mr. Nathan, Mr. Van Nest, is suggesting that the
12 parties might agree on the submission. And maybe this might
13 necessitate another question to them from me back to the
14 jury.

15 MR. VAN NEST: The other option, Your Honor,
16 would be to direct them to Claim 1, which is basically the
17 same language, and see what happens. I would prefer doing
18 that.

19 THE COURT: Let's try that first.

20 MR. NATHAN: Well, is that --

21 MR. VAN NEST: If they have further questions,
22 we can address it.

23 MR. NATHAN: As I say, Your Honor, there is so
24 much testimony about the parts that I'm sure is engrained in
25 their mind at this point. Two experts -- three experts.

1 All three experts were asked about this part, that part.
2 And, frankly, if I were the juror, that is what I would be
3 thinking. As I say, I can -- if what is bothering them is
4 the whole CoreValve device column with the checkmarks, I
5 can, if you give me five minutes, I'm sure I can figure out
6 some way to eliminate that.

7 THE COURT: What is your reaction to that
8 suggestion, Mr. Van Nest?

9 MR. VAN NEST: Again, it's the way their expert
10 parsed it up.

11 THE COURT: And we don't have a contrary?

12 MR. VAN NEST: We have our slides that show --
13 Your Honor saw that show the language we're disputing, you
14 know, that was shown in closing and with Dr. Rothman. We
15 don't have a full board. We have the slides that I
16 presented this morning. And those were similar to what
17 Dr. Rothman presented.

18 MR. NATHAN: All of these experts were cross
19 examined on both sides.

20 THE COURT: Given the objection, I'm not
21 inclined. If there was agreement, yes, we could get rid of
22 the checks and send it back, but there is not agreement so
23 they're not going.

24 MR. NATHAN: The only other thing I can think
25 of, there is a lot of talent in the room here, maybe

1 somebody can think of something, is to find out if there is
2 a piece of the claim. If they're thinking No. 9, we can
3 tell them what No. 9 is. If they're back there saying there
4 was a lot of talk about No. 9, what was No. 9, we could
5 identify that for them.

6 THE COURT: Mr. Van Nest.

7 MR. VAN NEST: But, again, No. 9 is the way they
8 framed it. I would prefer to just -- they have the claim
9 construction. I mean you could refer them to the claim and
10 the claim construction and say, you know, if you were going
11 to say, this is a demonstrative, it's not evidence, and then
12 let's see what happens. They may, between looking at the
13 claim and claim construction, that breaks it up a little
14 bit, be able to move on. And if they can't, we could deal
15 with it then.

16 (Pause.)

17 THE COURT: You may sit down, gentlemen, while I
18 try to ...

19 MR. NATHAN: Thank you, Your Honor.

20 THE COURT: And the patent itself, the '552 is
21 in their binders?

22 MR. NATHAN: Yes, Your Honor. It's Tab 1.

23 THE COURT: Okay. And the Court's claim
24 construction order is also in the binder.

25 MR. NATHAN: Yes. Tab 3, I think.

1 MR. VAN NEST: That is also attached, Your
2 Honor, to your jury instructions, I believe. The claim
3 construction.

4 (Pause.)

5 THE COURT: Ms. Walker, why don't you share this
6 with counsel.

7 (Note passed for review to counsel.)

8 MR. VAN NEST: Fine, Your Honor.

9 THE COURT: Okay. I'll read it into the record.
10 Do you agree, Mr. Nathan?

11 MR. NATHAN: Yes, I do, Your Honor.

12 THE COURT: So for the record, the Court, in
13 response to the question, has composed a note that reads as
14 follows: Members of the jury --

15 I'll date it and time. I'll date it at 1:37.

16 Members of the jury, the 12 point blue poster
17 is a demonstrative exhibit and has not been admitted into
18 evidence. The 12 point blue poster replicates the language
19 of Claim 1, the '552 patent, as in your jury notebooks,
20 along with the Court's claim construction -- and there is a
21 parenthetical -- (which is also appended to your final jury
22 instructions).

23 MR. NATHAN: I can confirm that the patent is in
24 Edwards notebook at Tab 1, if you want to direct them to
25 that, and the construction is at Tab 3.

1 THE COURT: I think this is adequate.

2 MR. NATHAN: All right.

3 MR. VAN NEST: Are they going to come in here,
4 Your Honor?

5 THE COURT: No, unless you want them.

6 MR. VAN NEST: No. I was going to turn the
7 board around.

8 THE COURT: Yes, I was just trying not to uproot
9 them at this point. I think this is simple enough.

10 MR. VAN NEST: Agreed.

11 THE COURT: Ms. Walker, will you give this to
12 the jury officer, please.

13 Counsel, let's recess.

14 (Recess taken while the jury continues
15 deliberations.)

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18 Reporters: Kevin Maurer and Brian Gaffigan

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